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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

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# No. 424

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CITY OF FERNDALE, A MICHIGAN MUNICIPAL CORPORATION,

*Appellant,*

*vs.*

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, JOHN G. CAMPBELL, TOWNSHIP OF ROYAL OAK, EDGAR B. WHITCOMB, ANNA S. WHITCOMB, CITY OF HIGHLAND PARK, VILLAGE OF OAK PARK, CITY OF PLEASANT RIDGE, CITY OF HUNTINGTON WOODS, CITY OF ROYAL OAK, CITY OF CLAWSON, CITY OF BERKLEY AND CITY OF HAZEL PARK

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## STATEMENT OF BASIS OF JURISDICTION

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The appellant in the above entitled cause, pursuant to Rule No. 12 of the Rules of the Supreme Court of the United States, files this statement showing the basis upon which it contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the decree of the Supreme Court of the State of Michigan en-

tered in the above entitled cause on the 24th day of June, 1947.

I

The statute believed to sustain appellate jurisdiction, is Section 237 (a) of the Judicial Code, as amended, which provides that a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal.

II

That in said cause there was drawn in question the validity of the following statutes of the State of Michigan, to-wit:

1. Act No. 58, Michigan Public Acts of 1927 (pages 69-71), in so far as it amended Section 3, of Act No. 116, Michigan Public Acts of 1923 (Township Special Assessment Act) (pages 161-2), by adding thereto the following provision:

> "If any such special assessment fund is insufficient to pay such bonds and interest thereon when due, the township board shall advance the amount necessary to pay such bonds, and shall be reimbursed from such assessments when collected, or by re-assessment of the deficiency if necessary."

and in so far as said added language applied to previously issued bonds payable from special assessments only. Appellant contends that when the above quoted provision is applied retrospectively and requires a general township tax to pay bonds which at the time of their issuance were payable solely from special assessments, it authorizes taxation for a private purpose and constitutes the taking of

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property without due process of law, in violation of Articles V and XIV (Section 1) of the Amendments to the United States Constitution.

2. Subdivision (d) of Section 4 of Act No. 13, Michigan Public Acts of 1932 (First Extra Session), as amended by Act No. 271, Michigan Public Acts of 1937 (page 490), which provides as follows:

> "All refunding bonds issued under the provisions hereof, except * * * (exception not here applicable), shall, unless, otherwise provided in such refunding bonds, be the general obligation of the issuing municipality and the full faith and credit of the same shall be pledged to the payment thereof."

Appellant contends that when the above quoted provision is applied to refunding bonds issued to refund bonds payable from special assessments only, it is unconstitutional as authorizing taxation for a private purpose and constitutes the taking of property without due process of law, in violation of Articles V and XIV, Section 1 of the Amendments to the United States Constitution.

## III

On December 16, 1940, the Hazel Park Non-Partisan Taxpayers Association and John G. Campbell, as plaintiffs, started this action in the Circuit Court for the County of Oakland, in Chancery, against the Township of Royal Oak to enjoin the levying and expending of *a general township tax* to pay principal and interest on certain refunding obligations issued by it as general obligations of the township, to refund special assessment bonds. Plaintiffs' lands were not in any of the special assessment districts. Under the statute in force at the time these original special assessment bonds were issued, aproximately two-thirds of them were not the general obligation of the township but were

payable from special assessments only. Soon after this action was started, Edgar B. Whitcomb and Anna S. Whitcomb, bondholders, the City of Highland Park, a bondholder, and the Village of Oak Park, a village within the township, intervened as defendants. The Public Debt Commission (now Municipal Finance Commission) of the State of Michigan also intervened but withdrew while the case was pending in the Supreme Court of Michigan.

IV

On February 13, 1942, the Township of Royal Oak filed an amended answer and added thereto a cross-bill of complaint in which it named as cross-defendants the cities of Ferndale, Royal Oak, Pleasant Ridge, Huntington Woods, Berkley, Clawson and Hazel Park. In its cross-bill of complaint, the township alleged that the said cities had, since the issuance of some or all of said original special assessment bonds, detached territory from the township either by incorporating from villages into cities or by annexation of territory, and that by reason of such detachments said cities had become liable for a portion of the moneys advanced or to be advanced by the township at large for the payment of principal and interest on such bonds and/or the obligations refunding the same.

V

The refunding obligations referred to in paragraph III above, were dated October 1, 1936, and consisted of the following:

1. Series A and Series B Refunding Bonds aggregating the principal sum of $206,100, issued for the purpose of refunding bonds of Special Assessment Districts Nos. 5 to 11, both inclusive, which original bonds were issued prior to April 21, 1927, the effective date of said Act No.

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58, Michigan Public Acts of 1927, requiring advancements from general township funds.

2. Certificates of Indebtedness aggregating the principal sum of $66,136.35, issued for the purpose of refunding defaulted interest accrued on said Districts Nos. 5 to 11 bonds.

3. Series C Refunding Bonds aggregating the principal sum of $97,225, issued for the purpose of refunding special assessment bonds issued subsequent to the effective date of said Act No. 58, Michigan Public Acts of 1927.

4. Certificates of Indebtedness aggregating the principal sum of $24,120.16, issued for the purpose of refunding defaulted interest on bonds issued subsequent to the effective date of said Act No. 58, Michigan Public Acts of 1927.

(See decree of the Michigan Supreme Court, paragraph 1, subdivision a, and paragraph 1, subdivision d, for original bonds and refunding bonds issued.)

The obligations referred to 3 and 4 above are not involved in this appeal.

VI

Appellant, City of Ferndale, was incorporated as a city on January 29, 1927, from territory formerly constituting the Village of Ferndale. The Village of Ferndale was a part of the Township of Royal Oak, but upon the incorporation of the City of Ferndale, such territory was automatically withdrawn from said township. The City of Ferndale also annexed territory from the Township of Royal Oak on August 23, 1927, March 3, 1928, June 11, 1928 and September 17, 1940. The detachments made by the City of Ferndale and other cities are set forth in Exhibit A, attached to the decree entered in the Supreme Court of the State of Michigan.

## VII

The township's claim for contribution by the various cities was based upon the provisions of Section 14 of Act No. 279, Michigan Public Acts of 1909 (City Home Rule Act), as amended (§.5.2093 Mich. Stat. Ann.), and the decision in *Dearborn Township* v. *City of Dearborn*, 308 Mich. 284. No contribution is required thereunder by any detaching city unless there was at the time of such detachment, an indebtedness against the township. Prior to April 21, 1927, when Act No. 58, Michigan Public Acts of 1927, became effective, a township could not pledge its full faith and credit for the payment of special assessment bonds issued under Act No. 116, Michigan Public Acts of 1923, as amended. *Royal Oak Township* v. *Pleasant Ridge*, 295 Mich. 289, 291. Districts Nos. 5 to 11 bonds were issued prior to the 1927 amendment, to-wit, on October 11, 1926. (Paragraph 1, subdivision a, of Supreme Court decree.) The township relies upon the advancement clause added by Act No. 58, Michigan Public Acts of 1927 (quoted in II above). The Michigan Supreme Court held that said advancement clause was retrospective as well as prospective in its operation, in *Whitman* v. *Township of Royal Oak*, 269 Mich. 146, 151, following the holdings in *Moore* v. *Harrison*, 224 Mich. 512, and *Regents of University of Michigan* v. *Pray*, 264 Mich. 693. Throughout this litigation, it has been the contention of the City of Ferndale and other cross-defendants, that the bonds pertaining to Special Assessment Districts Nos. 5 to 11, both inclusive, and the bonds refunding the same, have never constituted an indebtedness of the township; that the original bonds were issued under an act which did not authorize them to be made a general obligation of the township; that any act which became effective subsequent to the issuance of said bonds which made them a general obligation of the township, was repugnant

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to the due process clauses in the State and Federal Constitutions; and that any act which authorized the refunding of such bonds as general obligations of the township was likewise so repugnant.

## VIII

Appellant, City of Ferndale, first raised the Federal Constitutional questions sought to be here reviewed, in its amended answer to the cross-bill of Royal Oak Township, filed January 4, 1945 (R. 118), in paragraphs XXII and XXIV, as follows:

> "XXII. Further answering said cross-bill of Royal Oak Township cross-defendant City of Ferndale avers that the advancement clause added to Section 3 of Act 116 P. A. 1923 by Act 58 P. A. 1927 as applied to bonds issued prior to April 21, 1927 (its effective date) is unconstitutional in that a compliance therewith would deprive the general taxpayers of their property without due process of law in violation of Section 16 of Article II of the Constitution of Michigan, and Article V and Section 1 of Article XIV of the Amendments to the Constitution of the United States (R. 124-125).
>
> "XXIV. Further answering the cross-bill of Royal Oak Township cross-defendant City of Ferndale avers that Subdivision (d) of Section 4 of Act 13 P. A. 1932 (First Extra Session) as said section was amended by Act 271 P. A. 1937 is unconstitutional to the extent that it authorizes the refunding of Special Assessment bonds as general obligations of the issuing municipality thereby depriving the general taxpayers of their property without due process of law in violation of Section 16 of Article II of the Constitution of Michigan and Article V and Section 1 of Article XIV of the Amendments to the Constitution of the United States" (R. 125).

The Circuit Court passed upon these Federal questions in its decree filed October 1, 1945 (R. 224) in paragraph 2 thereof (R. 228) as follows:

> "2. Statutes under which bonds were issued are not unconstitutional.
>
> "The provisions of Act No. 58 Public Acts 1927 (Sec's. 2385-88 C. L. '29), requiring the Township Board to advance moneys to pay principal and interest on bonds, as applied to bonds issued prior to the effective date of said act, was not unconstitutional as authorizing the levy of a tax for a private purpose and did not constitute the taking of property without due process of law in violation of Section 16, Article II of the Michigan Constitution and Articles V and XIV, Section 1, of Amendments to the United States Constitution. The provisions of Subdivision d, Section 4 of Act No. 13, Public Acts 1932 (First Extra Session), as amended, providing that 'all refunding bonds issued under the provisions thereof except • • • (exception not here applicable) shall unless otherwise provided in such refunding bonds, be the general obligation of the issuing municipality and the full faith and credit of the same shall be pledged to the payment thereof,' as applied to the refunding bonds, was not unconstitutional as authorizing the levy of a tax for a private purpose and would not constitute the taking of property without due process of law in violation of Section 16, Article II of the Michigan Constitution, and Articles V and XIV, Section 1, of Amendents to the United States Constitution. Act No. 116, Public Acts 1923, as amended by Act No. 263, Public Acts 1925 and Act No. 58, Public Acts 1927 (Sec's. 2385-88 C. L. '29), and Act No. 13, Public Acts 1932 (First Extra Session), ((Sec's. 5.3201-5.3219 Stat. Ann.) (Subsequently repealed by Act No. 202 Public Acts 1943, with saving clause, being Sec's. 5.3188 (1)—(49) Stat. Ann.)) are constitutional" (R. 228-229).

These Federal questions were next raised by the City of Ferndale upon appeal to the Supreme Court of Michigan by

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assignment of errors in paragraphs 5, 6, 7 and 8 of its reasons and grounds for appeal (R. 239 and 240) as follows:

"5. The court erred in decreeing that at the time of the issuance of the refunding obligations described in subdivision (d) of paragraph 1 of its decree, it was the duty of the defendant Township of Royal Oak to discharge its contingent liability on the original special assessment bonds issued in respect to Districts Nos. 5 to 11, both inclusive, by the issuance of refunding obligations bearing the full faith and credit of the township, and that the said refunding bonds and certificates of indebtedness are valid and enforcible general obligations of defendant Township of Royal Oak.

"6. The court erred in decreeing that the provisions of Act No. 58, Public Acts of 1927, requiring the Township Board to advance moneys to pay principal and interest on bonds, as applied to bonds issued prior to the effective date of said act, was not unconstitutional as authorizing the levy of a tax for a private purpose and did not constitute the taking of property without due process of law in violation of Section 16 of Article II of the Michigan Constitution and Articles V and XIV, Section 1, of the amendments to the United States Constitution.

"7. The court erred in decreeing that the provisions of subdivision (d), Section 4, of Act No. 13, Public Acts of 1932 (First Extra Session), as amended, authorizing the issuance of general obligation refunding bonds, was not unconstitutional, when applied to the refunding of Districts 5 to 11 bonds, as authorizing the levy of a tax for a private purpose and would not constitute the taking of property without due process of law in violation of Section 16, Article II, of the Michigan Constitution and Articles V and XIV, Section 1, of the amendments to the United States Constitution.

"8. The court erred in decreeing against the City of Ferndale and other cities in like situation any liability premised upon the constitutionality of the ad-

vancement clause of Act No. 58, Public Acts of 1927, when applied to the priorly issued obligations of Special Assessment Districts Nos. 5 to 11, both inclusive, or any liability premised upon the constitutionality of subdivision (d) of Section 4 of Act No. 13, Public Acts of 1932 (First Extra Session), when applied to the refunding of any obligations which were not the general obligations of the Township of Royal Oak" (R. 239 and 240).

The Supreme Court of Michigan, on April 17, 1947, filed an opinion in this cause holding that the statutes in question were not unconstitutional as claimed (copy of which marked "Exhibit A" is hereto attached and made a part hereof). This opinion is published in 317 Mich. 607-631. The discussion of the constitutional questions is on pages 622-624.

The Supreme Court of Michigan, on June 24, 1947, entered a decree in this cause (copy of which marked "Exhibit B" is hereto attached and made a part hereof). Paragraph 2 thereof is as follows:

"2. Statutes under which bonds were issued are not unconstitutional.

"The provisions of Act No. 58, Public Acts 1927 (Sec's. 2385-88 C. L. '29), requiring the Township Board to advance moneys to pay principal and interest on bonds, which was both retrospective as well as prospective in effect, as applied to bonds issued prior to the effective date of said act, was not unconstitutional as authorizing the levy of a tax for a private purpose and did not constitute the taking of property without due process of law in violation of Section 16, Article II of the Michigan Constitution and Articles V and XIV, Section 1, of Amendments to the United States Constitution. The provisions of Subdivision k, Section 4 of Act No. 13, Public Acts 1932 (First Extra Session), as amended, providing that 'all refunding bonds issued

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under the provisions thereof, except * * * (exception not here applicable) shall unless otherwise provided in such refunding bonds, be the general obligation of the issuing municipality and the full faith and credit of the same shall be pledged to the payment thereof,' as applied to the refunding bonds was not unconstitutional as authorizing the levy of a tax for a private purpose and would not constitute the taking of property without due process of law in violation of Section 16, Article II of the Michigan Constitution, and Articles V and XIV, Section 1, of Amendments to the United States Constitution. Act No. 116, Public Acts 1923, as amended by Act No. 263, Public Acts 1925 and Act No. 58, Public Acts 1927 (Sec's. 2385-88 C. L. '29), and Act No. 13, Public Acts 1932 First Extra Session), ((Sec's. 5.3201-5.3219 Stat. Ann.) (Subsequently repealed by Act No. 202 Public Acts 1943, with saving clause, being Sec's. 5.3188 (1)—(49) Stat. Ann.)) are constitutional" (R. 4 and 5).

## IX

The Supreme Court of the State of Michigan is the highest court in the State of Michigan in which a decision in said suit could be had and the decree above referred to entered on the 24th day of June, 1947, was the final decree of said court in said suit.

## X

The following is a statement of the grounds upon which it is contended that the questions involved are substantial.

1. The advancement clause in Act No. 58, Michigan Public Acts of 1927, makes it mandatory upon a township board to advance general township funds to pay strictly special assessment bonds in event of a deficiency in the special assessment funds. If there are no general township funds available, then the township must levy a tax therefor. *Highland Park* v. *Dearborn Township*, 285 Mich. 440, 448.

2. The Supreme Court of the State of Michigan has held that said advancement clause is retroactive as well as prospective in effect and applies to bonds previously issued. *Hazel Park Non-Partisan Taxpayers Association* v. *Royal Oak Township* (this case), 317 Mich. 607, 620. Therefore the act requires the use of general township tax funds for the payment of Districts Nos. 5 to 11 bonds which were issued as being payable from special assessments only.

3. It is a well settled principle of constitutional law that no general tax can be levied except for the purpose of raising money for a public use. 51 Am. Jur. 373 and cases cited.

4. Whether a tax is for a public or private purpose is for the United States Supreme Court to decide in a case pending before it, and it is not bound by the decision of the State Supreme Court. *Olcott* v. *Fond Du Lac County,* 16 Wall. 678; 21 L. Ed. 382.

5. Taxation for a private purpose constitutes the taking of property without due process of law. *Bay City* v. *State Treasurer,* 23 Mich. 499, 501-2; *City of Parkersburg* v. *Brown, et al.,* 106 U. S. 487, 27 L. Ed. 238, 244.

6. The advancement clause in the 1927 act when applied to previously issued bonds, is for a private purpose inasmuch as it benefits no one except the bondholder. It gives him additional security for the payment of his bonds which he did not have under his bond contract. It imposes a tax for the benefit of the bondholder. The township is not benefited in any way. It has no moral obligation to pay bonds to which it did not pledge its full faith, credit and resources. See cases cited in 7 below.

7. A retroactive statute which requires the advancement of general township funds or the levy of a general township tax to pay bonds *already* issued, which at the

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time of their issuance were payable solely from special assessments, or any statute which authorizes the refunding of strictly special assessment bonds as general obligations, constitutes taxation for a private purpose and the taking of property without due process of law. *Berman* v. *Board of Education of City of Chicago* (360 Ill. 535), 196 N. E. 464, 467-8; *Stanley* v. *City of Great Falls* (86 Mont. 114), 284 Pac. 134, 139-40; *Oregon Short Line Railway* v. *Berg* (Idaho), 16 Pac. (2) 373, 374-6; *Harbond* v. *City of Reading* (Pa.), 49 At. (2) 817, 820-4; *Stutsman* v. *Arthur* (N. D.) 16 N. W. (2d) 449, 453-5. We concede that statutes making special assessment bonds the general obligations of the municipality and applying to future issued bonds only, are constitutional.

8. If the statutes in question are unconstitutional, then the bonds in re. Districts Nos. 5 to 11 (both original and refunding) were and are strictly special assessment bonds and constitute no indebtedness of the City of Ferndale, direct or indirect.

9. Except as to the territory annexed in 1940, all the detachments made by the City of Ferndale were made prior to the commencement of the case of *Whitman* v. *Royal Oak Township,* 269 Mich. 146, which was begun on October 7, 1932 (Exhibit 14, R. 186). While the decision and decree in that case is *res judicata* as to any territory within the township at the time of the commencement of that action, it is not *res judicata* as to any territory which was detached from the township prior thereto. *Township of Pierson* v. *Township Board of Reynolds Township,* 49 Mich. 224, 225; *Hale* v. *Baldwin Township Board,* 49 Mich. 270; *Township of Grant* v. *Township of Reno,* 114 Mich. 41, 43.

The appellant respectfully represents that the questions involved in its appeal to the Supreme Court of the United States are of a substantial nature. *Hamilton* v. *Regents of*

*University of California*, 293 U. S. 245, 258; *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 476-7.

XI

The Supreme Court of the United States has jurisdiction to review a final decree of the highest court of a State declaring constitutional a State statute, where such statute was timely attacked in the State court as being repugnant to the United States Constitution. *Municipal Investors Ass'n* v. *City of Birmingham*, 316 U. S. 153, 154-5, 86 L. Ed. 1341, 1343; *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481, 482-3, 86 L. Ed. 1611, 1614.

XII

Appellant's application for an appeal from the aforesaid decree of the Supreme Court of the State of Michigan to the Supreme Court of the United States, together with assignments of errors and this jurisdictional statement, were presented on the 22nd day of September, 1947, to The Honorable Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Therefore, the appellant respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal.

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Dated: September 22, 1947.

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## EXHIBIT "A"

## STATE OF MICHIGAN SUPREME COURT

HAZEL PARK NONPARTISAN TAXPAYERS ASSOCIATION and JOHN G. CAMPBELL, *Plaintiffs and Appellees,*

*v.*

TOWNSHIP OF ROYAL OAK, *Defendant and Cross-Plaintiff, and Appellee,* MUNICIPAL FINANCE COMMISSION (formerly Public Debt Commission), EDGAR B. WHITCOMB and ANNA S. WHITCOMB, CITY OF HIGHLAND PARK and VILLAGE OF OAK PARK, *Intervening Defendants and Appellees,* CITY OF FERNDALE, *Cross-Defendant and Appellant,* CITY OF PLEASANT RIDGE and CITY OF HUNTINGTON WOODS, CITY OF ROYAL OAK, CITY OF CLAWSON, CITY OF BERKLEY, *Cross-Defendants and Cross-Appellants,* CITY OF HAZEL PARK, *Cross-Defendant and Appellee*

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Before the Entire Bench

BOYLES, J.:

In 1940 plaintiffs Hazel Park Nonpartisan Taxpayers Association and John G. Campbell filed a bill of complaint in the Circuit Court for Oakland County in Chancery to enjoin the township of Royal Oak from collecting any taxes on property in said township lying outside of certain special assessment districts, for the purpose of paying instalments on certain refunding bonds issued by the township in 1938 to retire certain defaulted special assessment bonds issued in 1926, 1927 and 1928. The then Michigan public debt commission, now the municipal finance commission, which had authorized the issuance of the refunding bonds, the city of Highland Park and Edgar B. Whitcomb and Anna S. Whitcomb, as owners of some of the refunding bonds, and the village of Oak Park which had been organized from a portion of said township, were granted leave to intervene, and filed answers to the bill of complaint.

The township of Royal Oak as the original defendant subsequently filed an amended answer and cross bill, setting forth that after the issuance of some of the special assessment bonds or refunding bonds, the following seven municipalities: city of Royal Oak, city of Ferndale, city of Huntington Woods, city of Pleasant Ridge, city of Clawson, city of Berkley, and city of Hazel Park had annexed portions of the township's territory or incorporated portions of it within their respective cities, and were consequently chargeable with their pro rata shares of any indebtedness on such bonds which might be decreed against the township. These seven municipalities were named as cross-defendants, and appeared and filed answers.

The parties in the trial court represented four general interests: The township of Royal Oak, individual taxpayers who might be assessed for taxes to pay the refunding bonds, bondholders who accepted refunding bonds in exchange for special assessment bonds, and municipalities which might be proportionately liable to pay a pro rata share of the bonds because of acquisition of portions of the township territory through annexation or incorporation.

The special assessment bonds were originally issued to pay for sewer and water mains under Act No. 116, Pub. Acts 1923, as amended by Act No. 263, Pub. Acts 1925, and in the case of some of the bonds by Act No. 58, Pub. Acts 1927 (for present provisions, see Comp. Laws Supp. 1940, 1945, Sec. 2385 *et seq.*, Stat. Ann. and Stat. Ann. 1946 Cum. Supp. Sec's. 5.2411-5.2414).[1]

The refunding took place under authority of an order of the public debt commission, dated January 14, 1938, pursuant to Act No. 13, Pub. Acts 1932 (1st Ex. Sess.), as amended by Act No. 143, Pub. Acts 1933, and Act No. 42, Pub. Acts 1935, and Acts Nos. 16, 56, 98, 271, Pub. Acts 1937 (Stat. Ann. and Stat. Ann. 1938 Cum. Supp. Sec's 5.3201-5.3219). This legislation was repealed by Act No.

[1] Act No. 116, Pub. Acts 1923, has been further amended by Act No. 232, Pub. Acts 1929 (1 Comp. Laws 1929, Sec's. 2385—2388), Act No. 140 and Act No. 204, Pub. Acts 1931, Act No. 24, Pub. Acts 1934 (1st Ex. Sess.), Act No. 68, Pub. Acts 1935, Act No. 318, Pub. Acts 1937, Act No. 201, Pub. Acts 1941, and Act. No. 239, Pub. Acts 1945.

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202, Pub. Acts 1943,[2] which contains a saving clause (Comp. Laws Supp. 1943, Sec's. 2689-21-2689-103, Stat. Ann. 1943 Cum. Supp. Sec's. 5.3188 (1)-5.3188 (50)). Series A and B bonds refunded special assessment bonds issued on special assessment rolls 5 to 11, inclusive, prior to the effective date of Act No. 58, Pub. Acts 1927. Series C bonds refunded those issues subsequent to that date.

Commencing with the creation of each special assessment district the township began to levy special assessment taxes against the taxable property in each district, and continued such levies through the full 5-year period covered by the special assessment bonds. Instalments of principal and interest were paid for a time from collections of special assessment taxes, and from time to time thereafter with money from the general fund of the township when there was insufficient money in the special assessment funds to meet payments. On or before April 1, 1930, default was made in some of the issues, and by April 1, 1933, all of the issues were in default on interest and principal outstanding. The totals of the special assessment rolls were extremely high as compared with the assessed valuation of all taxable property in the districts. The percentage of special assessments to assessed valuation ran from a low of 6 per cent in one district to a high of 24 per cent in another, with an average of 13 to 14 per cent in all districts. Because of defaults in paying general taxes and special assessments, a large amount of property in the special assessment districts has gone through "scavenger" sale.[3]

At the time of the refunding, the township had only some $12,000 in its general fund, which was barely sufficient to pay outstanding orders already issued on that account. As of October 1, 1936, there was a total of $316,553.43 principal due on the special assessment bonds in question, and delinquent interest of $100,135.43.

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[2] Act No. 202, Pub. Acts 1943 has been amended by Act No. 20, Pub. Acts 1944 (1st Ex. Sess.), and Act No. 300, Pub. Acts 1945 (Comp. Laws Supp. 1945, Sec's. 2689—21—2689—102, Stat. Ann. 1946 Cum. Supp. Sec's. 5.3188 (1)—5.3188 (49)).—Reporter.

[3] See Act No. 155, Pub. Acts 1937, as amended (Comp. Laws Supp. 1940, 1945, Sec. 3723—1 *et seq.*, Stat. Ann. 1946 Cum. Supp. Sec. 7.951 *et seq.*).

Except as may be hereinafter noted, additional factual background underlying the questions raised on the instant appeal may be found in *Whitman* v. *Township of Royal Oak*, 269 Mich. 146; *Township of Royal Oak* v. *City of Pleasant Ridge*, 295 Mich. 284; *Township of Royal Oak* v. *City of Pleasant Ridge*, 307 Mich. 714; *Township of Royal Oak* v. *City of Berkley*, 309 Mich. 572.

In the circuit court the judge stated the claims of the parties as follows: The contention of the township of Royal Oak, defendant and cross-plaintiff, is that in view of the decision of this Court in the *Whitman* case, *supra*, its contingent liability on the special assessment bonds became fixed prior to the issuing of the refunding bonds, that the refunding bonds supplanted the special assessment bonds and are now the general obligation of the township in the same manner as the special assessment bonds, and that the intervening defendants and cross-defendants, which since the issuing of the special assessment bonds have annexed portions of the township territory, are each liable for a proportionate share of the refunding bonds.

It is the contention of the city of Royal Oak, cross-defendant, that (1) in no event did the city incur any liability as the result of the first annexation which took effect October 4, 1926, because the bonds had not been issued; (2) having fully settled all obligations incurred by the city as the result of the annexations of 1927 and 1929 the city is not liable by reason of those annexations; (3) Act No. 13, Pub. Acts 1932 (1st Ex. Sess.), as amended (see Comp. Laws Supp. 1940, 1942, Sec. 2705—1 *et seq.*, Stat. Ann. and Stat. Ann. 1942 Cum. Supp. Sec. 5.3201 *et seq.*), is unconstitutional in so far as it attempts to make refunded special assessment bonds general obligations, and therefore the city's liability if any, applies only to the annexation of 1942 and only to that portion of the refunded bonds that may be paid from recoverable special assessments.

It is the contention of the city of Ferndale, cross-defendant, that (1) the city of Ferndale did not assume any liability by reason of the detachment of territory from the township of Royal Oak when it became incorporated as a city on January 31, 1927, because there was no general obli-

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gation liability against the township of Royal Oak on that date in respect to any matters involved in this litigation. The only outstanding bonds were those issued in respect to districts 5 to 11, inclusive, and those bonds were strictly special assessment bonds; (2) the legislature by the passage of Act No. 58, Pub. Acts 1927 (amending Act No. 116, Pub. Acts 1923), could not constitutionally impose any general obligation liability upon the township as to bonds issued prior to the effective date of that act; and that therefore bonds in respect to districts 5 to 11, dated October 1, 1926, should be eliminated from any and all consideration in determining the liability of incorporating or annexing cities, except possibly in those cases where the decision in *Whitman* v. *Township of Royal Oak, supra,* whether right or wrong, would be *res judicata;* (3) the issuance of general obligation bonds to refund strictly special assessment bonds is not constitutionally permissible.

It is the contention of the city of Pleasant Ridge and the city of Huntington Woods, cross-defendants, that (1) inasmuch as no possibility exists for reimbursements of a general fund through subsequent collections of special assessments, the 1927 amendment imposing a liability on the township to pay out of its general fund is unconstitutional, both as to bonds theretofore and thereafter issued; (2) the township of Royal Oak must reassess the deficiency in collections of special assessments in order to provide funds to discharge the obligations of the refunding bonds.

The cross-defendants city of Hazel Park, city of Berkley and city of Clawson deny generally the claims of cross-plaintiff, the township of Royal Oak.

The contention of the bondholders Whitcomb, city of Highland Park, and municipal finance commission, intervening defendants, agrees with the contention of cross-plaintiff, and asserts that the refunding bonds are valid.

The trial court held: (1) That the special assessment bonds were made contingent liabilities of the township by Act No. 116, Pub. Acts 1923, as amended by Act No. 58, Pub. Acts 1927; (2) that this act and the act authorizing the refunding bonds were constitutional; (3) that a municipality which has annexed territory not included in any of the

special assessment districts is liable for its pro rata share of such liabilities; (4) that the township was not obliged to submit the issuance of bonds to electors of the township; (5) that the contingent liability of the township attached upon the confirmation of the special assessment rolls; (6) that none of the township's settlement agreements with the municipalities constituted accord and satisfaction; (7) that the township valuation to be used where there were successive annexations of territory during one year is the value shown by the current assessment rolls, less any deductions therefrom because of prior annexation or incorporation during the year; (8) that the township had no power or authority to levy additional special assessments for the purpose of paying the special assessment bonds, and that the township's failure to levy additional special assessment taxes did not affect the liability of the cross-defendant municipalities.

A decree was entered in effect as follows: (1) Specifically designating the special assessment bonds issued by the township and defining the liability of the township on the special assessment bonds thus issued, both as to original bonds and the refunding bonds; (2) declaring that the statutes under which these bonds were issued were not unconstitutional; (3) decreeing that the cross-defendant seven cities, Ferndale, Royal Oak, Hazel Park, Pleasant Ridge, Berkley, Huntington Woods, and Clawson, which had incorporated or annexed portions of the township were liable to the township notwithstanding that some portions of such territory so incorporated or annexed were not included in any of the special assessment districts; (4) that the township was not required to submit to the electorate the question of issuance of the special assessment bonds or the refunding bonds; (5) that the contingent liability of the township on the special assessment bonds was created on the dates of the confirmation of the respective rolls for the levying of special assessment taxes for the payment of such bonds and that each of the seven cross-defendant cities hereinbefore named, upon incorporation or annexation of a portion of the township territory at any time thereafter, became liable for its proportionate share of such contingent liability which existed at the time of such incorporation or annexation; (6)

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that the various settlement agreements between the township and the several cross-defendant cities did not constitute accord and satisfaction as to their respective rights and liabilities; (7) that where there were successive annexations during any one year the value of the taxable property of the township as shown by the total assessed valuation of all property in the township by the current assessment rolls, less any deductions therefrom because of prior incorporation or annexation of township territory during the year, must be used in determining the proper division of assets and liabilities of the township upon any subsequent incorporation or annexation of township territory during such year; (8) that the township had no power or authority to levy and collect reassessments in the special assessment districts to make up the deficiencies, and that the failure of the township to levy additional special assessment taxes for the purpose of paying the special assessment bonds did not relieve the seven cross-defendant cities hereinbefore named from their proportionate liability for the payment of such bonds; (9) that said seven cross-defendant cities were respectively liable for payment to the township of those portions of principal and interest on the special assessment bonds, the refunding bonds and certificates of indebtedness theretofore paid by the township out of funds derived by it other than from collections of special assessment taxes, and for contribution toward payment of such principal and interest remaining unpaid, to be determined according to the percentage of the assessed valuation of the taxable property of the portion of township territory incorporated or annexed by each such city at the time of each such incorporation or annexation, to the total assessed valuation in the township immediately before such incorporation or annexation; (10) that an accounting be had under the direction of the court between the township and the seven cross-defendant cities, to determine the total amount of money derived by the township from collections of special assessment taxes, total amount of interest and principal paid by the township on the bonds and certificates of indebtedness, and the amount which each of the said seven cities was liable to pay to the township; (11) defining the manner, method and time for such payments by the

seven cross-defendants cities; (12) retaining jurisdiction for the accounting, for determining questions which might arise concerning the carrying into effect of the decree and compensation of counsel, and dissolving all injunctions previously issued.

From this decree the city of Ferndale appeals, the cities of Pleasant Ridge and Huntington Woods have joined together in a cross-appeal, and the city of Royal Oak takes a separate cross-appeal. The other parties, not having sought a review, must be considered as content with the decree.

A. *Appeal of Ferndale.*

The city of Ferndale contends that it is not liable for any portion of the district 5 to 11 bonds, by reason of its incorporation on January 31, 1927, first because the pertinent section of the home-rule act (1 Comp. Laws 1929, Sec. 2250) at that time provided in terms only for division of liabilities upon *annexation.* A clause referring to *incorporation* was added by Act No. 233, Pub. Acts 1931 (Comp. Laws Supp. 1940, Sec. 2250, Stat. Ann. Sec. 5.2093). If this interpretation of the original act were correct it would be of doubtful constitutionality, for the bondholder could not be required to take less security upon a division of territory. *Board of Education of City of Lincoln Park* v. *Board of Education of City of Detroit,* 245 Mich. 411. But appellant (Ferndale) did not raise this question at the trial, and it was not presented as a ground of appeal; therefore we will not pass upon it here. *Franklin Mining Co.* v. *Harris,* 24 Mich. 115; *Mahiat* v. *Codde,* 106 Mich. 387; *Stanton* v. *Stanton,* 197 Mich. 161, 165; *Donahue* v. *Gordon,* 292 Mich. 581. The bonds with respect to assessment rolls Nos. 5 to 11 were issued prior to the effective date of Act No. 58, Pub. Acts 1927. This act added to section 3 of the original township special assessment act the following:

> "If any such special assessment fund is insufficient to pay such bonds and interest thereon when due, the township board shall advance the amount necessary to pay such bonds, and shall be reimbursed from such

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assessments when collected, or by reassessment of the deficiency if necessary."

While we conclude that this is retroactive as well as prospective in effect, we do not agree with appellant that if retroactive it is unconstitutional for that reason. This provision was held to be constitutional in *Whitman* v. *Township of Royal Oak, supra,* p. 151, notwithstanding it was there given a retroactive effect. It follows that the contingent liability of the township relates back to the date on which liability arose on the special assessment bonds. We do not read *Township of Royal Oak* v. *City of Pleasant Ridge,* 295 Mich. 284, to the contrary effect. The question here presented, as to the liability of the city (Pleasant Ridge, in that case) in case of inability of the township to obtain from special assessment funds sufficient to pay the bonds in full, whereby the township might eventually have to pay a balance due on such bonds from its general fund, was not there before the Court. It was said (p. 293):

> "Should such a condition ultimately come about, there might then be room for the contention that the contingent statutory liability to advance money from the township's general funds had accrued and that payment, when made, was necessitated because it was then a general obligation of the township contracted before the severance of township territory by the defendant city. In that event the question would be presented as to whether the defendant city of Pleasant Ridge would not be liable for payment of its proportionate share of the general liability of the township which had accrued because of inability, if such should happen, to derive sufficient funds from the special assessments or reassessments to discharge in full the bond indebtedness. Suffice to say that on this appeal we do not have before us nor are we herein passing upon such a case; but a reservation might well be made in the decree to be entered in this case covering such a contingency."

Any doubt as to the holding of the Court in *Township of Royal Oak* v. *City of Pleasant Ridge,* 295 Mich. 284, was

dispelled by this Court in *Township of Royal Oak* v. *City of Pleasant Ridge*, 307 Mich. 714, after a so-called consent decree which had been improperly entered in the circuit court in the original case was referred back to that court by this Court for further consideration. In the latter case we said (pp. 716, 719):

> "Unfortunately, instead of the decree being entered in this Court, it was entered in the court below and it was stated therein that the special assessment bonds were not the general obligation bonds of the township of Royal Oak. Evidently due to an oversight on the part of the attorneys, all reference to the consideration of a possible future liability, should a certain condition arise, was omitted.
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> • • • • • • •
>
> "The court was correct in granting the new decree *nunc pro tunc* following all the terms consented to in the decree theretofore entered in the circuit court but incorporating the wording of our opinion in leaving the liability of the city to future consideration should conditions arise so that the township of Royal Oak hereafter might claim that there was such liability."

This appellant (Ferndale) further contends that at the time of the city's incorporation, no liability existed against the township of Royal Oak, as Act No. 58, Pub. Acts 1927, which imposed the contingent liability of a guarantor upon the township, did not become effective until April 21, 1927. This is but another way of challenging the retroactive effect of that act, and it is equally without merit. Neither do we find any merit in appellant's contention that the above-quoted provision in Act No. 116, Sec. 3, Pub. Acts 1923, as amended by Act No. 58, Pub. Acts 1927, must be held unconstitutional if applied to special assessment bonds issued prior to the effective date thereof, in that it would constitute the taking of property (of the appellant city) without due process of law. The city, by its incorporation, carved taxable real estate out of the township which, under the contingency hereinbefore referred to, would become liable to

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taxation to pay defaulted special assessment bonds, for which payment the township ultimately became liable, the contingency having arisen. If the ultimate liability of the city must be considered as taking property without due process of law, the owners of the remaining taxable property in the township, after a city had taken out, by incorporation (or annexation), portions of the taxable property in the township, might be in an equal position to claim that, due to their increased burden of taxation, the city, by its very incorporation, was depriving them of property without due process of law. These viewpoints would equally ignore the ultimate rights of the bondholders. In furtherance of its claim that said Act No. 58, Pub. Acts 1927, is unconstitutional in that it takes property without due process of law, appellant contends that said act authorizes the levying of a tax for a private purpose, i.e., to pay bondholders. One weakness in this claim lies in the fact that the levy is, in effect, for the purpose of paying the original expense of the special improvements, through the medium of repaying those who loaned the funds for that purpose. The position taken by appellant was answered in the negative in *Whitman* v. *Township of Royal Oak, supra,* citing *Moore* v. *Harrison,* 224 Mich. 512, and *Regents of University of Michigan* v. *Pray,* 264 Mich. 693. To the same effect, even though there was no possibility of reimbursement, were *Graves* v. *Bliss,* 235 Mich. 364, certiorari denied, 273 U. S. 724 (47 Sup. Ct. 113, 71 L. Ed. 859); *City of Highland Park* v. *Dearborn Township* 285 Mich. 440; *City of Highland Park* v. *Oakland County Drain Commissioner,* 312 Mich. 407.

Appellant contends that the proposed tax would have no purpose other than the relief of bondholders, citing cases which have held such levies unconstitutional for that reason. We do not agree that the motives and purposes of the legislature are so lightly to be impugned. A statute may not be declared unconstitutional if there is any reasonable ground upon which its validity may be sustained. We agree with the courts which have held that the restoration of the credit of the municipality, the restoration of delinquent lands to the tax rolls, and the readjustment of the tax burden in a more equitable manner, are legitimate public purposes, which render the act constitutional even though applied

retroactively. *City of Crescent City* v. *Moran*, 25 Cal. App. (2d) 133 (77 Pac. (2d) 281); *County of San Diego* v. *Hammond*, 6 Cal. (2d) 709 (59 Pac. (2d) 478, 105 A.L.R. 1155); *Durrett* v. *Davidson*, 122 Ky. 851 (93 S. W. 25, 8 L. R. A. (N. S.) 546); *Deseret Savings Bank* v. *Francis*, 62 Utah, 85 (217 Pac. 1114). See, also, *City of Dunsmuir* v. *Porter*, 7 Cal. (2d) 269 (60 Pac. (2d) 836). It is immaterial that private persons may receive incidental benefits from the legislation. But the discharge of a moral obligation is also a legitimate end of legislation in cases of this type (*Lyman* v. *Chase*, 178 Minn. 244 (226 N. W. 633); *Kinney* v. *Astoria*, 108 Ore. 514 (217 Pac. 840)), and support for such legislation has been found in the continuing public benefit of the improvements themselves. *Comfort* v. *City of Tacoma*, 142 Wash. 249 (252 Pac. 929). See, also, dissenting opinion in *Oregon Short Line R. Co.* v. *Berg*, 52 Idaho, 499 (16 Pac. (2d) 373). We agree with the trial court that said act is not unconstitutional on the grounds urged, and this conclusion is in accord with the result reached in *Whitman* v. *Township of Royal Oak, supra.* This conclusion applies with equal force to appellant's claim that Act No. 13, Sec. 4, subd. i, Pub. Acts 1932 (1st Ex. Sess.), as amended (for refunding municipal indebtedness) is unconstitutional for like claimed reasons. We hold that both of said acts are not unconstitutional on the grounds asserted by said appellant herein.

The remaining question raised by this appellant (Ferndale) challenges the conclusion reached by the circuit court in holding that the township's liability on the special assessment bonds arose on the dates of the confirmation of the special assessment rolls. We are unable to agree with the reasoning of the trial court in that regard. Act No. 116, Sec. 3, Pub. Acts 1923, places a lien upon the lots assessed in a special assessment district, from the date of confirmation of the assessment roll. The confirmation of a special assessment roll does not *create* a liability against the township but rather creates a liability against the property owner. The confirmation of a special assessment roll may be a basis for the subsequent issuance of such bonds, but not necessarily so. If the assessment should be made due

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in one instalment, no bonds would be issued. The holding of the trial court is contrary to the holding of this Court in *Township of Dearborn* v. *City of Dearborn*, 308 Mich. 284. Bonds are issued not on the date which they bear, but rather when they are delivered to the purchaser, inasmuch as no liability is created against the issuer until such delivery. Section 14 of the Michigan negotiable instruments law (2 Comp. Laws 1929, Sec. 9261 (Stat. Ann. Sec. 19.54)) reads as follows:

> "The instrument is not invalid for the reason that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery."

The township's liability as guarantor cannot be said to arise before the bonds are issued and delivered. It is claimed that liability did not arise until the subsequent happening of the contingency, i.e., defaults and lack of special assessment funds. However, the township's liability, although contingent, was there continuously from the time of the delivery of the bonds. It is implied in *Township of Dearborn* v. *City of Dearborn, supra,* that this liability arises when the bonds are issued. Such a theory conforms with section 14 of the negotiable instruments laws, *supra.* We find in the record before us that the dates of delivery of the special assessment bonds were as follows:

| | | |
|---|---|---|
| Rolls | 5-11 | October 11, 1926 |
| | 12-18 | August 19, 1927 |
| | 22-25 | April 7, 1928 |
| | 26-34 | August 15, 1928 |
| | 35 | September 26, 1928 |

It was held in *Township of Dearborn* v. *City of Dearborn, supra,* p. 291, that the date of filing the result of the election with the secretary of State and the county clerk determines the date of incorporation, or annexation of territory detached from the township, and that the city becomes liable for contribution for indebtedness existing at the date of

annexation.[4] The liability of the city of Ferndale on rolls 12 through 18 does not, therefore, arise *by reason of its original incorporation* on January 31, 1927, but Ferndale does become proportionately liable thereon by virtue of the annexations of August 24, 1927, and later dates. Liability on rolls 5-11 attached to the city of Ferndale upon its incorporation as well as all later annexations. Its liability on rolls 22-25 attaches by reason of the annexations of June 14, 1928, and after; on rolls 26-35 by reason of the annexation of September 17, 1940.

The foregoing appears to be in accordance with a part of paragraph 5 of the decree, as it is construed by this Court. It might be proper to enter a clarification of said paragraph 5 when a decree is entered in this Court. The appellant city of Ferndale became liable for its proportionate share of such contingent liability in accordance herewith. Inasmuch as appellants city of Royal Oak, city of Pleasant Ridge and city of Huntington Woods have raised this same question on the appeal, the foregoing decides the issues as thus raised by them. In that connection, it is proper to add that we find from the record, that the cities of Pleasant Ridge, Huntington Woods and Royal Oak became liable as follows: City of Pleasant Ridge became proportionately liable on rolls 5—18 only, by its incorporation of December 31, 1927; city of Huntington Woods became proportionately liable on all bonds, by its incorporation of June 24, 1932; city of Royal Oak became liable on no bonds, by its annexation of October 4, 1926. It became proportionately liable on rolls 5—11, by annexation of April 22, 1927. It became proportionately liable on all bonds, by annexation of April 19, 1929, and later dates.

B. *Appeal of Pleasant Ridge,*

*Appeal of Huntington Woods.*

Except for two final questions, these appellants raise the same issues as those raised by the city of Ferndale, which have been answered. In addition, these appellants, briefly

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[4] See 1 Comp. Laws 1929, Sec. 2249 (Stat. Ann. Sec. 5.2092).—Reporter.

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joined in by the city of Royal Oak, challenge paragraph 8 of the decree wherein the trial court declared that the township had no power or authority to levy additional special assessments (reassessments?) for the purpose of paying the special assessment bonds, and that the failure to levy such "additional special taxes" did not relieve the seven cross-defendant cities from their proportionate liability. Appellants Pleasant Ridge and Huntington Woods claim (1) that when a deficiency exists reassessment must be made; and (2) that the failure of the township to reassess such deficiencies estops it from requiring "seceding municipalities to pay a share of the loss incurred thereby."

This case was originally started by the plaintiffs to enjoin the township from levying taxes on property in the township outside the special assessment districts, to make up deficiencies in paying the refunding bonds hereinbefore referred to. The attorney for the plaintiffs who filed the original bill of complaint did not appear in court at the hearings and plaintiffs have not appealed. The original purpose of the suit seems to have been overshadowed by the cross bills and claims of the contending parties here, to obtain an adjudication of their respective rights and liabilities. The question as to whether the township, and also the cities of Ferndale and Royal Oak, should be required "by mandatory writ of injunction" to reassess the amounts of the deficiencies in the special assessment districts, was injected into the case by a late amendment (filed after the hearing was begun) by the interpleaded defendants (cross-plaintiffs) Pleasant Ridge and Huntington Woods. A new paragraph was added to their prayer for relief by these cross-plaintiffs, asking for such a "mandatory" injunction. We do not find in the record any indication that this amendment to their cross bill was answered by any of the other parties to the case. While we have repeatedly said that the court in taking jurisdiction in equity, will retain jurisdiction in order to do complete justice and settle all disputed questions in one proceeding, if possible, we do not consider that such a "mandatory injunction" should issue in this case, under the circumstances. Decision as to whether the township should be compelled to levy reassessments against the spe-

cial assessment districts is not essential to decision on the other questions raised on this appeal.

The trial court, in paragraph 8 of the decree, referring to the effect of the township's failure to levy additional special assessment taxes, decreed as follows:

> "Defendant, township of Royal Oak, under the laws of this State had no power or authority to levy additional special assessments for the purpose of paying assessment bonds."

Act No. 116, Pub. Acts 1923 (1 Comp. Laws 1929, Sec. 2385 *et seq.*, as amended (Comp. Laws Supp. 1940, 1945, Sec. 2385 *et seq.*, Stat. Ann. and Stat. Ann. 1946 Cum Supp. Sec. 5.2411 *et seq.*)), provides for improvements by township boards. Counsel for Pleasant Ridge and Huntington Woods directs our attention to section 3 of said act, as amended (1 Comp. Laws 1929, Sec. 2387, as amended by Act No. 24, Pub. Acts 1934 (1st Ex. Sess.) (Comp. Laws Supp. 1940, Sec. 2387, Stat. Ann. Sec. 5.2413)), which provides in part that:

> "All proceedings relating to the making, levying and collection of special assessments herein authorized and issuing bonds in anticipation of the collection thereof, shall conform, as near as may be, to the proceedings for levying special assessments and issuing special assessment bonds by villages, for like improvements, as set forth in act number 3 of the public acts of Michigan for 1895, as amended, being chapter 72 of the compiled laws of Michigan for 1915, as amended. If any such special assessment fund is insufficient to pay such bonds and interest thereon when due and said bonds shall have been issued subsequent to the 21st day of April, 1927, the township board may advance the amount necessary to pay such bonds, and shall be reimbursed from such assessments when collected, *or by reassessment* of the deficiency if necessary."

Act No. 3, Pub. Acts 1895 (Comp. Laws 1915, chap. 72), as amended, referred to in the above section 3, is the general act for incorporation of villages. It may be found in 1 Comp. Laws 1929, Sec. 1465 *et seq.* (Stat. Ann. Sec. 5.1201

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*et seq.*). Section 12 of chapter 8 of that act (1 Comp. Laws 1929, Sec. 1624 (Stat. Ann. Sec. 5.1360)) provides:

> "Should any special assessment prove insufficient to pay for the improvement or work for which it was levied, and the expenses incident thereto, the council may, within the limitations prescribed for such assessments, make an additional pro rata assessment to supply the deficiency."

This has been been held to be mandatory. *Wood* v. *Village of Rockwood*, 311 Mich. 381, 389.

Said counsel for Pleasant Ridge and Huntington Woods claims that the foregoing refers to reassessment in special assessment districts, in connection with the questions raised on this appeal by said counsel for appellants Pleasant Ridge and Huntington Woods, as decided by the circuit court in paragraph 8 of the decree. We conclude that the present case is not the proper occasion to decide the question as to whether the township has the power to reassess and levy taxes against the property in the special assessment districts. That part of section 8 of the decree which purports to decree that the township does not have such power and authority will be deleted in the decree to be entered here. Many obvious problems to be settled in connection with any such reassessment have not been brought to our attention in the record and briefs in the instant case, and this is not a proper occasion for entering the "mandatory injunction" asked for by these two appellants, directing such reassessments. This we decline to do inasmuch as the facts and circumstances which might affect such decision are not here fully before us.

As to the other claim made by these appellants, that the township is estopped from claiming liability against the seven cross-defendant cities because it has failed to reassess taxes, we have no hesitation in saying that a failure to reassess does not terminate the liability of the cross-defendant cities to share proportionately in making up the deficiencies. The rights of bondholders cannot thus be ignored, nor is such reassessment to be considered as a condition precedent to attaching liability to cities which

by incorporation or by annexation of territory have taken taxable property out of the township. Such provision in paragraph 8 of the decree is affirmed.

A decree may be entered in this Court affirming the decree from which these appeals have been taken, except in the particulars hereinbefore noted, and in consonance herewith certain provisions in said decree are hereby reversed. In such particulars the decree to be entered here will be in conformity with this opinion, and it will provide for remanding to the circuit court for further proceedings in accordance with paragraph 12 of the decree.

We are not unmindful of the fact that the questions discussed herein are foreign to the issues originally raised by plaintiffs herein, in filing their bill of complaint. However, no one here questions the jurisdiction of the circuit court, or of this Court on the appeal, to consider and pass upon the questions raised by the interveners, or by the cross-appellants. For that reason, we are not here in conflict with our decision in *Youngs* v. *West*, *ante*, 539, wherein the question of jurisdiction was raised. The importance of the problems discussed herein, as they may affect the hearing in the circuit court on the remand for an accounting, are sufficient justification for entertaining jurisdiction of the same on this appeal.

Parties to the appeal having each prevailed only in part, and public questions being involved, no costs awarded.

Carr, C. J., and Butzel, Bushnell, Sharpe, Reid, North, and Dethmers, JJ., concurred.

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## EXHIBIT "B"

STATE OF MICHIGAN, SUPREME COURT

Circuit Court No. 21,917

Supreme Court No. 43,479

Appeal from the Circuit Court for the County of Oakland, In Chancery

Honorable Frank L. Doty, Circuit Judge

HAZEL PARK NON-PARTISAN TAX PAYERS ASSOCIATION and JOHN G. CAMPBELL, *Plaintiffs and Appellees,*

*v.*

TOWNSHIP OF ROYAL OAK, *Defendant and Cross-Plaintiff, and Appellee;* MUNICIPAL FINANCE COMMISSION (formerly Public Debt Commission), EDGAR B. WHITCOMB and ANNA S. WHITCOMB, CITY OF HIGHLAND PARK and VILLAGE OF OAK PARK, *Intervening Defendants and Appellees;* CITY OF FERNDALE, *Cross-Defendant and Appellant;* CITY OF PLEASANT RIDGE, and CITY OF HUNTINGTON WOODS, CITY OF ROYAL OAK, CITY OF CLAWSON, CITY OF BERKLEY, *Cross-Defendants and Cross Appellants;* CITY OF HAZEL PARK, *Cross-Defendant and Appellee*

### Decree

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court room in the Capitol in the City of Lansing, on the 24th day of June, 1947:

Present the Honorable Leland W. Carr, Chief Justice; Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North and John R. Dethmers, Associate Justices.

This cause having come on to be heard, and having been duly argued by counsel for the respective parties, and having been duly considered by the court, and the court having filed a written opinion herein, and it appearing to the

court that the decree of the circuit court for the County of Oakland, in Chancery, heretofore entered in said case, except as the same is hereinafter modified should be affirmed.

It is therefore ordered, adjudged and decreed:

1. Liability of defendant, Township of Royal Oak, on bonds.

a. Special assessment bonds issued.

Because the Township of Royal Oak, Oakland County, Michigan issued the following Special Assessment Bonds in anticipation of the collection of special assessments in each of the Special Assessment Districts Nos. 5 to 11, 12 to 18, 22 to 25 and 27 to 35, all inclusive, for the installation of water mains, sewers and street improvements, which bonds were issued and sold in groups as follows:

| Bonds re S. A. Dist. Nos. | Date of Bonds | Date of Delivery of Bonds to Purchaser | Aggregate Amount of Bonds |
|---|---|---|---|
| 5 to 11 incl. | Oct. 1, 1926 | Oct. 11, 1926 | $342,500.00 |
| 12 to 18 incl. | Aug. 15, 1927 | Aug. 19, 1927 | 88,750.00 |
| 22 to 25 incl. | April 1, 1928 | April 7, 1928 | 74,500.00 |
| 27 to 34 incl. | July 1, 1928 | Aug. 15, 1928 | 89,000.00 |
| 35 | Sept. 1, 1928 | Sept. 26, 1928 | 37,000.00 |
| | | | $631,750.00 |

the unpaid balances of which formed the basis of the Refunding Bonds of the township involved in this action, the Township of Royal Oak, as of the aforementioned respective dates of delivery of such bonds to the purchasers, by force of law, was placed in the position of a guarantor, obligated to advance from its general funds sufficient money for the prompt payment of all principal and interest due thereon if at any time the funds derived from the collection of special assessment taxes from the rolls in said Special Assessment Districts were insufficient to make such payments, which contingent liability continued until the obligation of such bonds was fully satisfied.

b. Statutory provisions concerning Special Assessment Bonds.

The bonds issued in Districts Nos. 5 to 11, both inclusive, in the principal amount of $342,500.00, were issued under

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the provisions of Act No. 116 Public Acts 1923, as amended by Act No. 263 Public Acts 1925. The bonds issued in Districts Nos. 12 to 18, 22 to 25, 27 to 34 and 35, all inclusive, were issued under said Act No. 116 Public Acts of 1923, as so amended and as further amended by Act No. 58 Public Acts 1927, effective April 21, 1927, (Sec's. 2385-2388 C. L. '29) which latter act added to Section 3 thereof the following sentence:

> "If any such special assessment fund is insufficient to pay such bonds and the interest thereon when due, the township board shall advance the amount necessary to pay such bonds, and shall be reimbursed from such deficiency if necessary."

c. Township liability upon Special Assessment Bonds.

The foregoing provisions of the statutes, as construed by the decisions of the Supreme Court, created a contingent liability against defendant, Township of Royal Oak, at large, not only as to bonds issued after April 21, 1927, but also as to Special Assessment bonds in Districts Nos. 5 to 11, both inclusive, issued prior to said date, and said defendant was obligated to advance from its general funds sufficient money for the prompt payment of all principal and interest due upon said Special Assessment bonds, if, at any time the funds derived from the collection of Special Assessment taxes in said special assessment districts were insufficient to make such payments, which contingent liability continued until the obligations on such bonds were fully satisfied.

d. Township liability on Refunding Bonds.

In the years 1938 and 1939, defendant Township of Royal Oak, pursuant to the provisions of Act No. 13, Public Acts 1932 (First Extra Session), as amended by Act No. 143, Pub. Acts 1933, Act No. 42 Pub. Acts 1935 and Act No. 98 and Act No. 271, Pub. Acts 1937 (Sec's. 5.3201-19 Mich. Stat. Ann.) issued callable refunding bonds, dated October 1, 1936 and payable October 1, 1966, for the purpose of refunding the principal of such of the aforesaid Special Assessment Bonds as was then unpaid, and issued callable

certificates of indebtedness, dated October 1, 1937 and payable October 1, 1947, for the purpose of refunding the unpaid interest on such Special Assessment Bonds. The series and amounts of said refunding bonds and certificates of indebtedness, divided as to bonds bearing different issuance dates, are as follows:

| Refunding Obligations | Obligations Refunded | | Principal Amount Refunding Obligations Issued |
|---|---|---|---|
| Ser. A Ref. Bonds | Part of Principal of Districts 5/11 bonds | | $ 45,600.00 |
| Ser. B Ref. Bonds | Part of Principal of Districts 5/11 bonds | | 160,500.00 |
| Ser. C Ref. Bonds | Principal of Districts 12/18 bonds | $30,175.00 | |
| Ser. C Ref. Bonds | Principal of Districts 22/25 bonds | 16,900.00 | |
| Ser. C Ref. Bonds | Principal of Districts 27/34 bonds | 24,500.00 | |
| Ser. C Ref. Bonds | Principal of District 35 bonds | 25,650.00 | 97,225.00 |
| Total Refunding Bonds Issued | | | $303,325.00 |
| Certificates of Indebtedness | Interest on Districts 5/11 bonds | | 66,136.35 |
| Certificates of Indebtedness | Interest on Districts 12/18 bonds | | 9,303.89 |
| Certificates of Indebtedness | Interest on Districts 22/25 bonds | | 3,132.45 |
| Certificates of Indebtedness | Interest on Districts 27/34 bonds | | 5,806.25 |
| Certificates of Indebtedness | Interest on District 35 bonds | | 5,877.57 |
| Total Certificates of Indebtedness Issued | | | $90,256.51 |

The following original bonds which were authorized to be refunded, were retired prior to exchange of bonds to-wit:

| | |
|---|---|
| District No. 13 | $4,000.00 |
| District No. 15 | 500.00 |
| District No. 17 | 500.00 |
| 1931 Ref. Bonds, Ser. A. | 8,000.00 |

and the following amounts were paid in cash on original bonds, to-wit:

| | |
|---|---|
| Districts 5/11 | $ 225.93 |
| District 22 | 2.50 |

At the time of the issuance of said refunding obligations, defendant Township was in default in the payment of principal in the aggregate principal amount of $303,325.00, and, in the payment of accrued interest in the amount of

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$90,263,26, and had no, or, insufficient, funds derived from collections on special assessment taxes from the rolls in said special assessment districts out of which to pay the same, and, it thereupon became and was the duty of defendant, Township of Royal Oak, to discharge its contingent liability thereon by the issuance of said Refunding Bonds and Certificates of Indebtedness to refund such liability, and said Refunding Bonds and Certificates of Indebtedness are valid and enforceable general obligations of defendant, Township of Royal Oak.

2. Statutes under which bonds were issued are not unconstitutional.

The provisions of Act No. 58, Public Acts 1927, (Sec's. 2385-88 C.L. '29) requiring the Township Board to advance moneys to pay principal and interest on bonds, which was both retrospective as well as prospective in effect, as applied to bonds issued prior to the effective date of said act, was not unconstitutional as authorizing the levy of a tax for a private purpose and did not constitute the taking of property without due process of law in violation of Section 16, Article 11 of the Michigan Constitution and Articles V and XIV, Section 1, of Amendments to the United States Constitution. The provisions of Subdivision k, Section 4 of Act No. 13, Public Acts 1932 (First Extra Session), as amended, providing that "all refunding bonds issued under the provisions thereof, except * * * (exception not here applicable) shall unless otherwise provided in such refunding bonds, be the general obligation of the issuing municipality and the full faith and credit of the same shall be pledged to the payment thereof," as applied to the refunding bonds, was not unconstitutional as authorizing the levy of a tax for a private purpose and would not constitute the taking of property without due process of law in violation of Section 16, Article 11 of the Michigan Constitution, and Articles V and XIV, Section 1, of Amendments to the United States Constitution. Act No. 116, Public Acts 1923, as amended by Act No. 263, Public Acts 1925 and Act No. 58, Public Acts 1927, (Sec's. 2385-88 C. L. '29) and Act No. 13, Public Acts 1932 (First Extra Session), ((Sec's. 5.3201-

5.3219 Stat. Ann.) (Subsequently repealed by Act No. 202 Public Acts 1943, with saving clause, being Sec's. 5.3188 (1) — (49) Stat. Ann.)) are constitutional.

3. Liability of incorporating or annexing municipality, where incorporated or annexed territory did not include any part of any special assessment district.

Cross-defendants, City of Ferndale, City of Royal Oak, City of Hazel Park, City of Pleasant Ridge, City of Berkley, City of Huntington Woods and City of Clawson, which incorporated or annexed portions of the territory of defendant, Township of Royal Oak, are liable to defendant, Township of Royal Oak, as herein provided, notwithstanding that some portions of such territory so incorporated or annexed were not included in any of the special assessment districts.

4. Township not required to submit question of issuance of bonds to electors.

Defendant Township of Royal Oak under the laws of the State of Michigan was not required to submit the question of the issuance of the Special Assessment Bonds or the Refunding Bonds to a vote of the electors of the township.

5. Date of creation of contingent liability of defendant and cross-defendants on Special Assessment Bonds.

The contingent liability of defendant Township of Royal Oak on the Special Assessment Bonds which form the basis of this action was created on the respective dates of the delivery of such bonds to the purchasers as hereinbefore set forth in paragraph 1a. hereof, and each of the cross-defendants, City of Ferndale, City of Royal Oak, City of Hazel Park, City of Pleasant Ridge, City of Berkley, City of Huntington Woods and City of Clawson, upon incorporation or annexation of a portion of the Township territory at any time thereafter, became liable for its proportionate share of such contingent liability which existed at the time of such incorporation or annexation.

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6. Settlement agreements did not constitute accord and satisfaction.

The various settlement agreements between the Township of Royal Oak and the several cross-defendant municipalities, which incorporated or annexed portions of township territory, did not constitute accord and satisfaction as to the contingent liability of the Township of Royal Oak and such municipalities on the Special Assessment Bonds and Refunding Bonds.

7. Valuation of township where there are successive annexations durings any one year.

The value of the taxable property of the township, as shown by the total assessed valuation of all property in the township by the current assessment rolls, less any deductions therefrom because of prior incorporation or annexation of township territory during such year, must be used for the purpose of determining the proper division of assets and liabilities of the township upon any subsequent incorporation or annexation of township territory during such year.

8. Effect of township's failure to levy additional special assessment taxes.

The failure of the township to levy additional special assessment taxes for the purpose of paying the Special Assessment bonds did not relieve cross-defendants, City of Ferndale, City of Royal Oak, City of Hazel Park, City of Pleasant Ridge, City of Berkley, City of Huntington Woods and City of Clawson, from their proportionate liability for the payment of such bonds as hereinbefore decreed. Provided, however, this decree is without prejudice to the rights of any parties hereto, relative to the alleged duty to levy reassessments (or additional pro-rata assessments) to cover deficiencies in the collection of assessments in the various special assessment districts.

9. Liability of Municipalities on Refunding Bonds.

Cross-defendants, City of Ferndale, City of Royal Oak, City of Hazel Park, City of Pleasant Ridge, City of Berk-

ley, City of Huntington Woods and City of Clawson are liable, respectively, for the payment to the defendant, township of Royal Oak, of those portions of principal and interest on the Special Assessment Bonds and the Refunding Bonds and Certificates of Indebtedness heretofore paid by the defendant Township of Royal Oak out of funds derived by it other than from collections of special assessment taxes from the rolls in said Special Assessment Districts, and for contribution to the payment of those portions of principal and interest on the Refunding Bonds and Certificates of Indebtedness remaining unpaid, such liability to be determined according to the percentage of the assessed valuation of the taxable property of portion of Township territory incorporated or annexed by each such municipality, at the time of each such incorporation or annexation, to the total assessed valuation of the taxable property in the Township immediately before such incorporation or annexation. The schedule attached hereto as Exhibit A and made a part hereof, sets forth the essential information together with the dates of delivery of such bonds set forth in paragraph 1a. hereof, to be used in determining such liability:

10. Accounting.

An accounting shall be had under the direction of the Circuit Court for the County of Oakland, in Chancery, between defendant Township and cross-defendant cities to determine the total amount heretofore derived by the Township from collections of special assessment taxes from the rolls in such Special Assessment Districts, the total amount of principal and interest heretofore paid by the Township for principal and interest on said Special Assessment Bonds and on said Refunding Bonds and certificates of Indebtedness, the amounts which the respective cross-defendants are liable to pay to the Township by reason of amounts of principal and interest heretofore paid by the Township for principal and interest on said Special Assessment Bonds and on said Refunding Bonds and Certificates of Indebtedness from funds other than those derived from collections of special assessment taxes from rolls in said Special As-

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sessment Districts, and the amounts which the respective cross-defendants are liable to contribute by reason of amounts of principal and interest which remain unpaid on said Refunding Bonds and Certificates of Indebtedness.

11. Method of Payment.

Cross-defendant municipalities, City of Ferndale, City of Royal Oak, City of Hazel Park, City of Pleasant Ridge, City of Berkley, City of Huntington Woods and City of Clawson, for the year 1947, or in the first year following the entry of a decree in said accounting, unless a longer period be granted by the said circuit court in chancery, shall raise a sufficient amount to repay defendant township for any sums found due it on the accounting decree in the foregoing paragraph hereof, and, at the close of the tax collection period, shall pay the same to defendant township. Defendant township and cross-defendant municipalities shall, each year after the entry of this decree, raise a sufficient amount to pay their respective shares of all principal and interest during such year on said Refunding Bonds and Certificates of Indebtedness less any receipts from special assessment taxes, and cross-defendants shall, at the close of each tax collection period, pay the same to defendant Township, or by depositing the same with the paying agent hereafter designated by the said circuit court in chancery, to be deposited in a special account for the payment of principal and interest on said bonds.

12. Retention of jurisdiction.

Jurisdiction over all of the matters herein involved shall be retained by the Circuit Court for the County of Oakland, In Chancery, for the purpose of determining all questions which may arise in connection with the execution and carrying into effect of the terms and provisions hereof upon completion of the accounting hereinbefore directed, and, for the further purpose of determining the compensation which should be allowed to counsel for the intervening defendants, Edgar B. Whitcomb and Anna S. Whitcomb and the City of Highland Park, acting in behalf of all holders of Refunding Bonds, Series A, B and C, and Certificates of

Indebtedness, issued in connection therewith, from amounts which are to be paid by the defendant Township of Royal Oak and the cross-defendant Cities to the holders of such Refunding Bonds and Certificates of Indebtedness, and leave is hereby granted to any of the parties hereto to make application to said court at any time for such orders or directions as may be necessary or proper in relation thereto.

All injunctions heretofore issued in connection with proceedings in this cause may be, and, the same hereby are dissolved.

Inasmuch as questions of a public nature are involved no costs will be taxed.

—— ——.

IN THE SUPREME COURT, CLERK'S OFFICE

STATE OF MICHIGAN, *ss:*

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of decree entered —— ——, ——, in said Court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Lansing, this — day of ——, A. D., 1947.

—— ——,
*Clerk.*

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EXHIBIT A

| Name of Incorp. (I) or Annexing (A) Municipality | | Date of Filing Election Results With Secretary of State | Assessed Valuation of Territory Taken | Assessed Valuation of Territory Immediately Before Separations | Valuation Based on Assessment Roll for Year of | Liability of Municipality | | Refunded by Refunding Sinking Fund Bonds—Series: |
|---|---|---|---|---|---|---|---|---|
| | | | | | | Percentage of Liability % | on Bonds re Roll Numbers: | |
| 1. Ferndale | (I) | 1-29-27 | $14,457,780 | $53,145,995 | 1926 | 27.2039 | 5-11 Inc. | |
| 2. Royal Oak | (A)2 | 4-25-27 | 2,393,580 | 38,688,215 | 1926 | 6.1868 | 5-11 Inc. | |
| 3. Ferndale | (A) | 8-23-27 | 806,550 | 38,945,060 | 1927 | 2.0710 | 5-11 Inc.<br>12-18 Inc. | |
| 4. Pleasant Ridge | (I) | 1- 3-28 | 3,982,465 | 38,138,510 | 1927 | 10.4421 | 5-11 Inc.<br>12-18 Inc. | |
| 5. Ferndale | (A) | 3- 3-28 | 985,200 | 34,156,045 | 1927 | 2.8844 | 5-11 Inc.<br>12-18 Inc. | |
| 6. Ferndale | (A) | 6-11-28 | 1,499,046 | 33,453,689 | 1928 | 4.4810 | 5-11 Inc.<br>12-18 Inc.<br>22-25 Inc. | |
| 7. Royal Oak | (A) | 4-16-29 | 244,572 | 31,954,643 | 1928 | .7654 | 5-11 Inc.<br>12-18 Inc.<br>22-25 Inc.<br>27-34 Inc.<br>35 | |
| 8. Royal Oak | (A) | 9-14-29 | 2,170,745 | 31,482,285 | 1929 | 6.8951 | 5-11 Inc.<br>12-18 Inc.<br>22-25 Inc.<br>27-34 Inc.<br>35 Inc. | |
| 9. Berkley | (I) | 4-18-32 | 4,955,925 | 27,954,468 | 1931 | 17.7286 | 5-11 Inc.<br>12-18 Inc.<br>22-25 Inc.<br>27-34 Inc.<br>35 | |
| 10. Huntington Woods | (I) | 6-22-32 | 2,792,095 | 17,740,413 | 1932 | 15.7386 | 5-11 Inc.<br>12-18 Inc.<br>22-25 Inc.<br>27-34 Inc.<br>35 | |

COPY BOUND VERTICALLY

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EXHIBIT A—Continued

| Name of Incorp. (I) or Annexing (A) Municipality | | Date of Filing Election Results With Secretary of State | Assessed Valuation of Territory Taken | Assessed Valuation of Territory Immediately Before Separations | Valuation Based on Assessment Roll for Year of | Liability of Municipality | | Refunded by Refunding Sinking Fund Bonds—Series: |
|---|---|---|---|---|---|---|---|---|
| | | | | | | Percentage of Liability % | on Bonds re Roll Numbers: | |
| 11. Clawson | (I) | 6-13-40 | 905,975 | 12,604,270 | 1939 | 7.1878 | 5-11 Inc. | A |
| | | | | | | | 5-11 Inc. | B |
| | | | | | | | 12-18 Inc. | C |
| | | | | | | | 22-25 Inc. | C |
| | | | | | | | 27-34 Inc. | C |
| | | | | | | | 35 | C |
| | | | | | | | Accrued Interest | IRCI* |
| 12. Ferndale | (A) | 9-17-40 | 76,600 | 7,913,525 | 1940 | .9680 | 5-11 Inc. | A |
| | | | | | | | 5-11 Inc. | B |
| | | | | | | | 12-18 Inc. | C |
| | | | | | | | 22-25 Inc. | C |
| | | | | | | | 27-34 Inc. | C |
| | | | | | | | 35 | C |
| | | | | | | | Accrued Interest | IRCI |
| 13. Hazel Park | (I) | 9-29-41 | 4,933,550 | 9,595,530 | 1941 | 51.4151 | 5-11 Inc. | A |
| | | | | | | | 5-11 Inc. | B |
| | | | | | | | 12-18 Inc. | C |
| | | | | | | | 22-25 Inc. | C |
| | | | | | | | 27-34 Inc. | C |
| | | | | | | | 35 | C |
| | | | | | | | Accrued Interest | IRCI |
| 14. Royal Oak | (A) | 2-20-42 | 950,156 | 4,661,980 | 1941 | 20.3810 | 5-11 Inc. | A |
| | | | | | | | 5-11 Inc. | B |
| | | | | | | | 12-18 Inc. | C |
| | | | | | | | 22-25 Inc. | C |
| | | | | | | | 27-34 Inc. | C |
| | | | | | | | 35 | C |
| | | | | | | | Accrued Interest | IRCI |

* IRCI—Interest Refunding Certificates of Indebtedness.

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FILED
NOV 10 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

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No. 424

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CITY OF FERNDALE,
a Michigan Municipal Corporation,
Appellant,
vs.
HAZEL PARK NON-PARTISAN TAXPAYERS
ASSOCIATION, et al.,
Appellees

---

## BRIEF FOR APPELLANT, CITY OF FERNDALE, IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM MADE BY TOWNSHIP OF ROYAL OAK AND BY EDGAR B. WHITCOMB, ANNA S. WHITCOMB AND CITY OF HIGHLAND PARK

---

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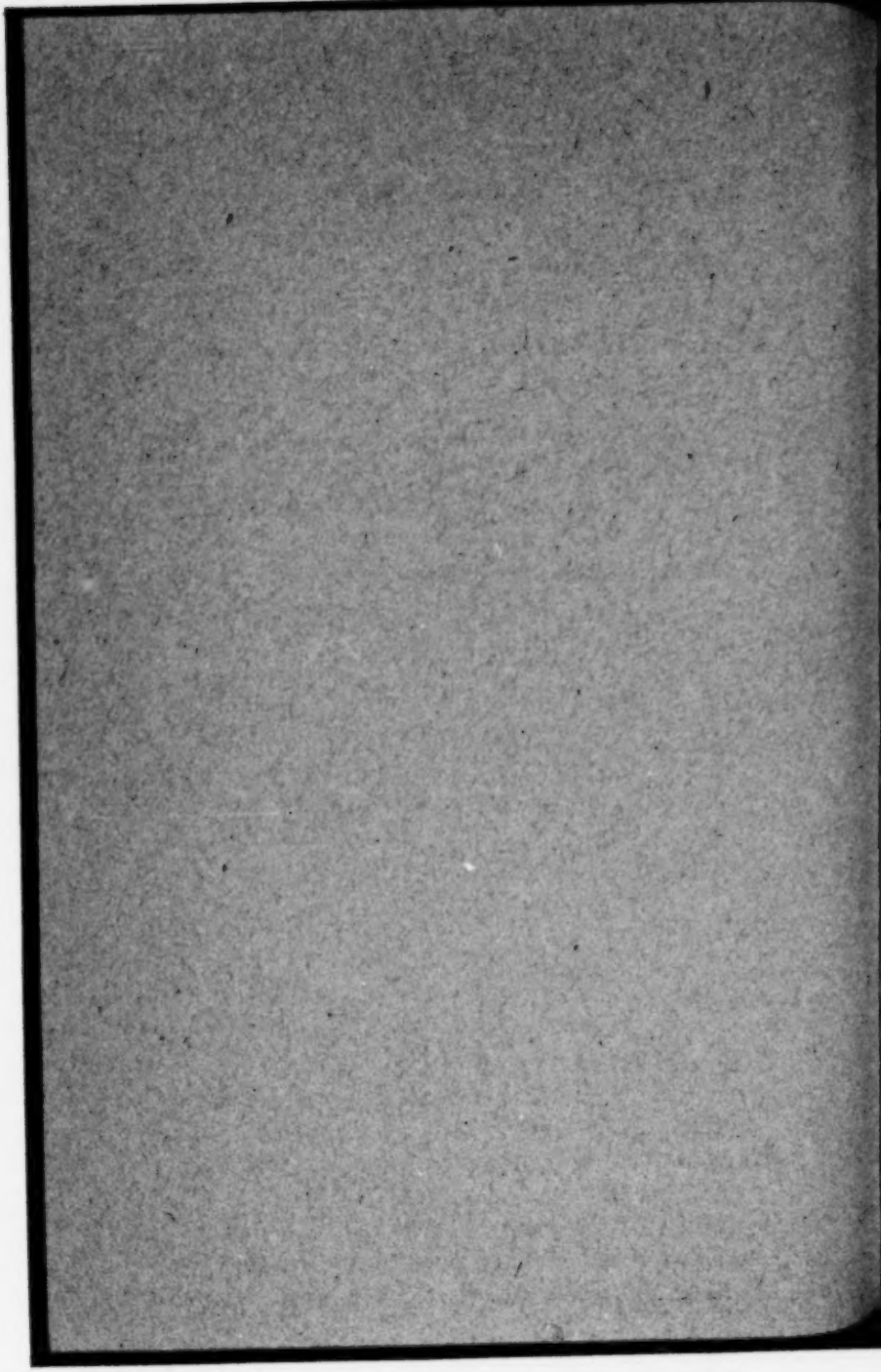

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

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No. 424

---

CITY OF FERNDALE,
a Michigan Municipal Corporation,
Appellant,
vs.
HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, et al.,
Appellees

---

## BRIEF FOR APPELLANT, CITY OF FERNDALE, IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM MADE BY TOWNSHIP OF ROYAL OAK AND BY EDGAR B. WHITCOMB, ANNA S. WHITCOMB AND CITY OF HIGHLAND PARK

---

### NATURE OF MOTIONS

The Township of Royal Oak has filed a motion to dismiss the appeal for the reason that no Federal question is presented. Edgar B. Whitcomb, Anna S. Whitcomb and the City of Highland Park have filed a motion to dismiss the appeal, first, for the reason that no Federal question is presented, and second, for the reason that no substantial Federal question is presented.

Both of the above mentioned motions ask for an affirmance of the decree of the Supreme Court of the State of Michigan, for the reason that the questions involved are so frivolous as to need no further argument.

## STATEMENT OF FACTS

This is an appeal from a decree entered by the Michigan Supreme Court. Its opinion is reported in 317 Mich. 607. In order for the court to better understand the legal questions raised by the motions, we will briefly set forth the facts underlying our appeal and the grounds therefor.

1. On October 11, 1926, the Township of Royal Oak, Oakland County, Michigan, issued $342,500 special assessment bonds, dated October 1, 1926, for local improvements in Special Assessment Districts Nos. 5 to 11, both inclusive, under the provisions of Act No. 116, P. A. 1923 (paragraph 1, subdivisions (a) and (b), Supreme Court decree). These bonds under the statute then existing, did not require the township to advance moneys from its general funds for the payment thereof. They were payable solely from special assessments.

2. On January 29, 1927 (about 4 months after the issuance of the above mentioned bonds), Ferndale incorporated from a village into a city thereby detaching its territory from the Township of Royal Oak. (Under the Michigan laws, territory comprising a village is a part of the township, but territory comprising a city is not.) At the time of said incorporation, the above mentioned bonds were not a general liability of the township. Subsequently it annexed other territory from the Township of Royal Oak.

3. By Act No. 58, P. A. 1927, effective April 21, 1927 (which was subsequent to the issuance of said bonds and

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also subsequent to the incorporation of Ferndale as a city), the Michigan Legislature added to Section 3 of said Act No. 116, P. A. 1923, the following sentence:

> "If any such special assessment fund is insufficient to pay such bonds and interest thereon when due, the township board shall advance the amount necessary to pay such bonds, and shall be reimbursed from such assessments when collected, or by reassessment of the deficiency if necessary."

(Paragraph 1, subdivision (b), Supreme Court decree.)

4. The Supreme Court of the State of Michigan in *Whitman v. Township of Royal Oak*, 269 Mich. 146, 151, held that the advancement clause in the 1927 amendatory act was retroactive and therefore applicable to those previously issued bonds. That case was started October 7, 1932 (cross-bill of township, paragraph 7), which was over 5 years after the territory comprising the City of Ferndale had ceased to be a part of the township. The City of Ferndale was not a party to that action (X, Jurisdictional statement).

5. The Township of Royal Oak defaulted on the bonds in question because of the non-payment of the special assessments and the later cancellation thereof by reason of property being sold to the State for the non-payment of taxes and special assessments. In 1939, the Township of Royal Oak issued Series A and Series B Refunding Bonds, dated October 1, 1936 and payable October 1, 1966, in the aggregate amount of $206,100, for the purpose of refunding the outstanding principal of said Districts Nos. 5 to 11 special assessment bonds, and also issued certificates of indebtedness, dated October 1, 1937 and payable October 1, 1947, in the aggregate amount of $66,136.35, for the purpose of refunding the defaulted interest on said Districts Nos. 5 to 11 special assessment bonds

(Supreme Court decree, paragraph 1, subdivision (d)). These refunding bonds and certificates of indebtedness were issued as general obligations of the township under the provisions of the then Act No. 13, P. A. 1932 (1st Extra Session) (Par. 2 of II, Jurisdictional statement).

6. Under the decisions of the Michigan Supreme Court and of this Court, the right to reassess for any deficiency has been cancelled as to a large percentage of the properties in the district, which were sold to the State for nonpayment of taxes. *Municipal Investors Association v. City of Birmingham*, 298 Mich. 314, 316 U. S. 153; *Keefe v. Oakland County Drain Commissioner*, 306 Mich. 503, 322 U. S. 393.

7. The Township of Royal Oak claims that the City of Ferndale, inasmuch as it was a part of said township when said original bonds were issued, is liable for that portion of the principal and interest due on the outstanding refunding bonds and certificates of indebtedness, which represents the percentage of the assessed valuation of territory withdrawn from the township.

8. The above mentioned claim of the township is without foundation if the provisions of said Act No. 58, P. A. 1927, and said Act No. 13, P. A. 1932 (1st Extra Session), making general township obligations out of previously issued strictly special assessment bonds, are unconstitutional.

9. This appellant contended in the lower courts and in this court contends that because said bonds were strictly special assessment bonds at the time of their issuance, any law which requires the advancement of moneys from the general funds of the township or which authorizes such bonds to be refunded as general obligations of the township, is unconstitutional as authorizing the tak-

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ing of property without due process of law, inasmuch as the general obligation of the township was not a part of the bond contract and any ad valorem tax levied for the payment of said bonds benefits the bondholder only. For authorities see Jurisdictional statement, X, 7.

## QUESTIONS INVOLVED

In motions to dismiss the appeal or to affirm the decree entered in the Michigan Supreme Court, and in the statements alleging lack of jurisdiction on appeal, the following questions are raised (exclusive of the inapplicability of the Fifth Amendment which we admit) to-wit:

1. Has the City of Ferndale, a political subdivision of the State of Michigan, the right to contest the validity of the statutes in question, as being in violation of the due process clause in the Fourteenth Amendment?

2. Is there a substantial Federal question involved in this appeal?

3. Are the questions raised by this appellant frivolous?

## ARGUMENT

### I.

### HAS THE CITY OF FERNDALE, A POLITICAL SUBDIVISION OF THE STATE OF MICHIGAN, THE RIGHT TO CONTEST THE VALIDITY OF THE STATUTES IN QUESTION AS BEING IN VIOLATION OF THE DUE PROCESS CLAUSE IN THE FOURTEENTH AMENDMENT?

The contentions of the Township of Royal Oak in this respect are set forth in its statement alleging lack of jurisdiction on appeal. The Whitcombs and the City of Highland Park in their statement do not set forth any additional reasons but adopt the statement and authorities set forth in that of the township.

The basis of their argument is that the City of Ferndale being a subdivision of the State of Michigan and therefore an instrumentality of that state, may not invoke the protection of the Fourteenth Amendment against the acts of the State Legislature.

The appellees quote in support of their position, certain general statements found in *16 C. J. S.* p. 1158, and *12 Am. Jur.*, p. 288. Each of these quotations is followed in the text by numerous exceptions. The only cases cited by appellees are *Trenton v. New Jersey*, 262 U. S. 182; *Newark v. New Jersey*, 262 U. S. 192; and *Risty v. Chicago, R. I. & Pac. Ry.*, 270 U. S. 378. These cases which are also cited in the notes to the texts above referred to, are not applicable here.

In *Trenton v. New Jersey, supra*, the State had granted to the City of Trenton (as assignee of the original grantee) the right to take the water required by it from the Delaware River. Subsequently in 1907, an act of the

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State Legislature required every municipality, corporation or private person to make payment to the State for all water diverted in excess of the amount then being legally diverted. In support of this act, this court said:

> "The state undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants, and the act of 1907 was passed pursuant to the policy of the state to prevent waste and to economize its water resources" (p. 185).

The City of Trenton contended that said grant constituted a contract between it and the State and therefore was property, and that the 1907 statute took such property without due process of law. The court held that "a municipality is merely a department of the state and the state may withhold, grant or withdraw powers and privileges as it sees fit" (p. 187). That case was decided upon the proposition that the City of Trenton had no contract with the State and therefore the 1907 act took nothing from the city. In the present case we are not relying upon any contract relationship with the state.

The case of *Newark v. New Jersey, supra,* involved the validity of the same act, but in that case there had been no previous grant by the State to the City of Newark and the basis of its attack upon the 1907 act was "on the sole ground that it violates the equal protection clause of the Fourteenth Amendment." The court simply said that the regulation of municipalities is a matter peculiarly within the domain of the State.

*Risty v. Chicago, R. I. & Pac. Ry., supra,* involved the validity of an assessment for benefits resulting from the construction or repair of a drainage system. Among the appellees was the City of Sioux Falls. The court held that as to the City of Sioux Falls, there was no substantial

Federal question, inasmuch as the power of the State and its agencies over municipal corporations is not restrained by the provisions of the Fourteenth Amendment, citing *Trenton v. New Jersey, supra.* We find nothing in the opinion which would indicate that the city was not benefited by the project. It is well recognized that where such benefit exists, a State law can require an assessment upon the city.

The act involved in the above mentioned New Jersey cases, requiring the payment to the State of a fee for water taken from a public river, which was passed to prevent waste and to economize the State's water resources, and the act involved in the Risty case, which imposed an assessment upon a benefited municipality, are a far cry from the act attacked in the present case which imposes a tax not in return for a benefit to the municipality, but rather a tax which confers solely a benefit upon "a" bondholder in addition to the terms of his previously executed bond contract.

While it is true that within a certain scope the State may control the acts of its municipalities, yet we have been unable to find any case, and the appellees have cited none, which goes so far as to deny to a municipality the right to contest upon constitutional grounds the validity of a State act *requiring the municipality to levy a tax for a private purpose.*

The rule claimed by appellees and the cases supporting it go no further than to hold a municipality cannot interpose the defense of lack of due process as to a legislative act terminating or modifying a previous grant to it by the State, because such a grant is subject to change or cancellation by the State at its will, or to an act controlling such municipalities in matters relating to the public good. However, it is fundamental that the State has no

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right to impose a tax for a private purpose and in so far as we have been able to discover, no court has held that the municipality cannot defend upon constitutional grounds any attempt by the State to require the imposition of such a tax by the municipality.

### A Municipality Has the Right to Claim the Protection of the Due Process Clause in Behalf of Its Taxpayers

In paragraphs XXIII and XXIV of appellant's answer to the cross-bill of complaint of the Township of Royal Oak, it is alleged that the legislative acts here under attack deprived the general taxpayers of their property without due process of law in violation of the Fourteenth Amendment.

The rule that a municipality may prosecute or defend an action not only in behalf of itself as a legal entity, but also on behalf of the public, is set forth in *38 Am. Jur.* 424, as follows:

> "§720. Municipality as Representative of Inhabitants or Individuals—In many instances, a municipal corporation may bring a representative action in behalf of its inhabitants to protect, preserve, or establish a common right. Among other results of such practice, a multiplicity of suits is avoided. Where such an action is brought, it is not brought by the common council as such, for the members of that body merely represent the municipality. The municipal corporation sues, and it is composed of the inhabitants of the locality. Thus, a municipality has authority to file a bill to restrain a breach of a contract for the furnishing of utility service under specified terms, notwithstanding its inhabitants or citizens can redress the wrong individually or collectively, and is a proper party in proceedings to require a public service company to continue the performance of its public service in a reasonably ade-

quate manner for the benefit of the municipality and its inhabitants. Such an action is not to recover loss or injury suffered by an individual, but is brought by the municipality, representing the inhabitants, to prevent a possible loss or inconvenience to them by a noncompliance on the part of the utility company with the contract made by it with the municipal corporation. In a similar type of action involving the identical interest of many inhabitants of a municipal corporation, the municipality is a proper party to be made defendant in the suit as representative of all interested.

"A municipal corporation has the authority, in behalf of the people, to maintain an action for the purpose of preserving the rights of the general public in, and to the use of, public property and premises. *Similarly, in such a case, where the municipality is a defendant, it is the representative of the public.* * * *" (Emphasis ours.)

The rule is supported by the following decisions of the Michigan Supreme Court and the United States Supreme Court:

*City of Saginaw v. Consumers Power Company*, 213 Mich. 460, 482;

*Lincoln Park Board of Education v. Detroit Board of Education*, 245 Mich. 411, 417;

*Ferndale School District v. School District No. 8*, 293 Mich. 1, 8;

*City of Grand Rapids v. Consumers Power Company*, 216 Mich. 409, 411;

*Kersh Lake Drainage District v. Johnson*, 309 U. S. 485;

*In re Engelhard & Sons Company*, 231 U. S. 646.

In the *City of Saginaw* case, the court said on page 482:

"But it does not follow that the city may not maintain this bill on behalf of the public, on behalf of its

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> citizens, on behalf of the consumers of commercial light and power * * * We think the city as representative of its inhabitants may maintain this bill in their behalf and thus avoid a multiplicity of suits."

In the *Lincoln Park* case, the court held that the legislative act impaired the obligation of the bondholder's contract, and in answer to the suggestion that a bondholder alone could raise the question, the court on page 417 said:

> "In our opinion it would not only be unjust to require the bondholder to be put to the expense of such action when its rights can be fully determined in the proceeding before us, but also unjust to the plaintiff to require it to make default in payment and be subjected to the expense incident to such a proceeding."

In the *Ferndale School District* case, certain persons attempted to intervene as plaintiffs claiming that they were legally a part of the plaintiff school district rather than the defendant school district. The court, on page 8 said:

> "Ordinarily a municipality represents the citizen in litigation relating to municipal matters"

citing, among other cases, *City of Grand Rapids v. Consumers Power Company*, 216 Mich. 409, 411, where the court said:

> "In litigation brought by a city the taxpayer is heard through the accredited representative of the city—its city attorney."

This court, in *Kersh Lake Drainage District v. Johnson, supra*, held that certain prior litigation in which certificate holders were not parties was *res judicata* as to them, because in such litigation they were represented by the drainage district commissioners.

In *In re Engelhard & Sons Company*, this court denied the Engelhard & Sons Company's petition to intervene, and on page 651 said:

> "The city was the proper party to make defendant in the suit as representative of all interested, and so throughout the whole proceedings. If we may suppose in a case like the present one there can be a distinction between the public interest and private interest, the subscribers of the company being the public, the representation of both interests was adequately fulfilled. It was in consequence of the motion of the city that the telephone company agreed to keep account of charges in excess of the ordinance rates, and, if they should finally be decided to be illegal, to pay into court the excess sums for distribution among its subscribers. It was the representative of all interests to provide for the creation of the fund; it is properly the representative of all interests to see to its proper distribution. This is a necessary deduction from the cases. It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them."

Certainly, if a municipality or its officials, can represent utility consumers and creditors, then it can represent its taxpayers. If it can represent its taxpayers, *then it must be able to assert any defense which the taxpayer might himself assert.*

The appellees do not claim that the constitutional question could not be raised by the taxpayer. The effect of their argument would be that the municipality must levy the tax if the state law so provides. A court decision to that effect would be valueless, because the taxpayer could raise the constitutional question subsequently when the tax has been levied by the municipality. The courts in the

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above cases have refused to require such extended litigation and have permitted the municipality to raise the question in a representative capacity.

## II.

### IS THERE A SUBSTANTIAL FEDERAL QUESTION INVOLVED IN THIS APPEAL?

This question is raised in the motion of the Whitcombs and the City of Highland Park. These appellees claim that the State Legislature had power to authorize the issuance of general obligation bonds by townships for improvements and that having such power, the legislature could subsequently make previously issued special assessment bonds the general obligations of the township without running afoul of the Fourteenth Amendment. They cite in support of their contention, the case of *Charlotte Harbor Ry. v. Welles, et al.*, 260 U. S. 8, 11, and *Seattle v. Kelleher*, 195 U. S. 351, 359. The first case involved a statute validating proceedings theretofore taken in respect to a special assessment district. The second case sustained the validity of an act authorizing a new assessment where the work had been previously performed and there was a question as to whether the original act authorized the improvement. These cases are in line with many other cases which hold that if the legislature had power in the first instance to authorize a certain procedure, but in exercising that power adopted an act which was deficient, then later it may validate the proceedings taken under such deficient authorization. Those cases are no support for the constitutionality of an act which authorizes a tax for a private purpose. In the present case, there is no question about the validity of the original assessment proceedings and no question about the validity of the original bonds as special assessment bonds. The 1927 act did not attempt to correct any imperfection in the original act, but rather after the bond con-

tract had been entered into, it added to that contract a tax provision which benefited solely the holder of the bonds. Some statutes have been sustained on the basis of a prior moral obligation, but in the present case no such obligation existed.

## III.

### ARE THE QUESTIONS RAISED BY THIS APPELLANT FRIVOLOUS?

This question is raised in respect to the motions to affirm the Michigan Supreme Court decree. Appellees make no argument in support thereof. We therefore content ourselves with reference to the jurisdictional statement.

### Similar Motion

The Township of Royal Oak has made a similar motion in connection with a separate appeal in this case by the Cities of Pleasant Ridge and Huntington Woods. We refer the court to the arguments made in the brief in behalf of those cities.

## CONCLUSION

For the reasons aforesaid, we submit that the motions of the appellees should be denied.

Respectfully submitted,

ORPH C. HOLMES,
*Attorney for City of Ferndale, Appellant,*
125 West Nine Mile Road,
Ferndale, Michigan.

CLAUDE H. STEVENS,
*Of Counsel,*
1000 Penobscot Building,
Detroit 26, Michigan.

Dated November 6, 1947.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TZRM, 1947

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# No. 424

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CITY OF FERNDALE, A MICHIGAN MUNICIPAL CORPORATION,

*Appellant,*

*vs.*

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, JOHN G. CAMPBELL, TOWNSHIP OF ROYAL OAK, ET AL.

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

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## STATEMENT OF TOWNSHIP OF ROYAL OAK OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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GLENN C. GILLESPIE,
FRANKLIN E. MORRIS,
*Counsel for Appellees.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

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# No. 424

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CITY OF FERNDALE, A MICHIGAN MUNICIPAL CORPORATION,

*Appellant,*

*vs.*

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, JOHN G. CAMPBELL, TOWNSHIP OF ROYAL OAK, EDGAR B. WHITCOMB, ANNA S. WHITCOMB, CITY OF HIGHLAND PARK, VILLAGE OF OAK PARK, CITY OF PLEASANT RIDGE, CITY OF HUNTINGTON WOODS, CITY OF ROYAL OAK, CITY OF CLAWSON, CITY OF BERKLEY AND CITY OF HAZEL PARK,

*Appellees*

---

## STATEMENT BY APPELLEE, TOWNSHIP OF ROYAL OAK, SHOWING LACK OF JURISDICTION OF APPEAL.

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Now comes appellee, Township of Royal Oak, and shows the following matters of record, which disclose that these appellants, have no right of review of the decision of the supreme court of Michigan in the above entitled cause, under the rules and practice of this Court:

**1. The 5th Amendment to the Constitution Does Not Apply**

The 5th Amendment to the Constitution of the United States, relied upon in part by appellants, was designed exclusively as a restriction upon the exercise of Federal power, and does not apply to laws enacted by, or, proceedings had under the authority of, a State government.

Authorities too numerous to cite, collected under note in 1 F.C.A. commencing at page 250, and supplement No. 1 at page 179.

**2. Appellant, City of Ferndale, Has No Rights under 14th Amendment**

Appellant, City of Ferndale, being a mere instrumentality of the State of Michigan, may not invoke the protection of the 14th Amendment as against acts of the State legislature directing the levying of taxes on territory annexed by the city.

The provisions of Section 1 of the 14th Amendment to the Constitution of the United States, under the well-settled law, may be invoked only by citizens of the United States, and does not limit the power of a state over its political subdivisions.

*Trenton* v. *New Jersey*, 262 U. S. 182, 67 L. Ed. 937, 43 SCR 534, 29 ALR 1471;

*Newark* v. *New Jersey*, 262 U. S. 192, 67 L. Ed. 943, 43 SCR 539;

*Risty* v. *Chicago, R. I. & P. Ry.*, 270 U. S. 378, 70 L. Ed. 641, 46 SCR 236.

"The power of a state to control its own governmental agencies and political subdivisions is unrestrained by the requirements of due process of the law, and since the requirement is a limitation on the state itself,

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it is not available to the state, or its agencies or political subdivisions."

16 C.J.S., p. 1158.

"So far as the state and its instrumentalities are concerned, there is no scope for invoking the due process guaranty against the action of the state itself."

12 Am. Jur., p. 288.

See also *Graves* v. *Bliss*, 235 Mich. 364, 209 N. W. 142, involving a similar statute under the drain law, where certiorari was denied by this Court in *Bliss* v. *Graves*, 273 U. S. 724, 71 L. Ed. 859.

Dated at Pontiac, Michigan, this 6th day of October, 1947.

Respectfully submitted,

GLENN C. GILLESPIE,
*1101 Pontiac State Bank Bldg.,*
*Pontiac, Michigan;*
FRANKLIN E. MORRIS,
*22,748 Woodward Avenue,*
*Ferndale, Michigan,*
*Attorneys for Appellee,*
*Township of Royal Oak.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

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# No. 424

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CITY OF FERNDALE, A MICHIGAN MUNICIPAL CORPORATION,

*Appellant,*

*vs.*

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, JOHN G. CAMPBELL, TOWNSHIP OF ROYAL OAK, EDGAR B. WHITCOMB, ANNA S. WHITCOMB, CITY OF HIGHLAND PARK, VILLAGE OF OAK PARK, CITY OF PLEASANT RIDGE, CITY OF HUNTINGTON WOODS, CITY OF ROYAL OAK, CITY OF CLAWSON, CITY OF BERKLEY AND CITY OF HAZEL PARK,

*Appellees*

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## MOTION TO DISMISS OR AFFIRM

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Now comes the Township of Royal Oak, defendant, cross-plaintiff and appellee, by Glenn C. Gillespie and Franklin E. Morris, its attorneys, and moves this Honorable Court:

1. To dismiss the writ of error heretofore issued in the above entitled cause, and, all proceedings thereunder, for the reason that no Federal question is presented by the record.

2. In case the foregoing motion is denied, to affirm the decree of the Supreme Court of Michigan for the reason that it is final as to appellant, and the questions involved are so frivolous as to need no further argument.

This motion is based on the records and files in said cause and the statement and authorities heretofore filed in this cause by appellee showing lack of jurisdiction of this Court of said appeal.

Dated at Pontiac, Michigan, this 6th day of October, 1947.

GLENN C. GILLESPIE,
*1101 Pontiac State Bank Bldg.,*
*Pontiac, Michigan;*
FRANKLIN E. MORRIS,
*22,748 Woodward Avenue,*
*Ferndale, Michigan,*
*Attorneys for Appellee,*
*Township of Royal Oak.*

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SUPREME COURT OF THE UNITED STATES

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CITY OF FERNDALE, A MICHIGAN MUNICIPAL CORPORATION,

*Appellant,*

vs.

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, JOHN G. CAMPBELL, TOWNSHIP OF ROYAL OAK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

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## STATEMENT BY APPELLEES, EDGAR B. WHITCOMB, ANNA S. WHITCOMB AND CITY OF HIGHLAND PARK, OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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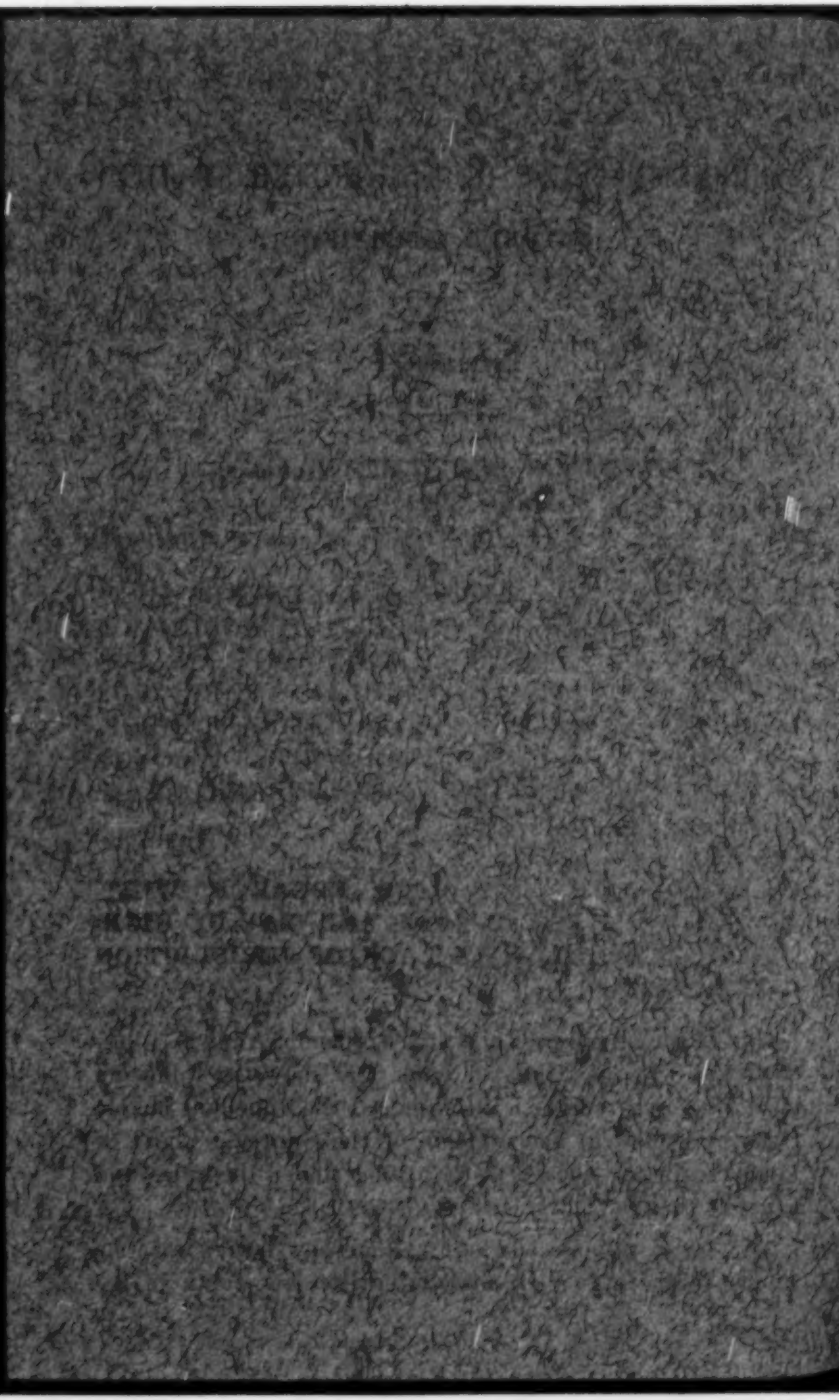
LEO H. JOSLYN, JR.,
SHELDON S. DICKINSON,
*Counsel for Appellees.*



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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

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# No. 424

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CITY OF FERNDALE, A MICHIGAN MUNICIPAL CORPORATION,

*Appellant,*

*v.*

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, JOHN G. CAMPBELL, TOWNSHIP OF ROYAL OAK, EDGAR B. WHITCOMB, ANNA S. WHITCOMB, CITY OF HIGHLAND PARK, VILLAGE OF OAK PARK, CITY OF PLEASANT RIDGE, CITY OF HUNTINGTON WOODS, CITY OF ROYAL OAK, CITY OF CLAWSON, CITY OF BERKLEY AND CITY OF HAZEL PARK,

*Appellees.*

## STATEMENT BY APPELLEES, EDGAR B. WHITCOMB, ANNA S. WHITCOMB AND CITY OF HIGHLAND PARK, SHOWING LACK OF JURISDICTION OF APPEAL.

Now come appellees, Edgar B. Whitcomb, Anna S. Whitcomb and City of Highland Park, and show the following matters of record, which disclose that the appellant has no right of review of the decision of the Supreme Court of Michigan in the above entitled cause under the rules and practice of this Court:

1-2. These appellees adopt and hereby incorporate by reference the statement and authorities set forth in the

statement heretofore filed herein by the appellee, Township of Royal Oak, showing lack of jurisdiction of the appeal.

3. **No substantial Federal question is presented.**

Even if the appellant has the right to appeal and possesses rights which are entitled to the protection of the 14th Amendment, in the light of the prior decisions of this Court no substantial Federal question is presented and the appeal should be dismissed for want of jurisdiction.

The appellant does not contend that the Michigan Legislature lacks power to authorize the issuance of general obligations by counties and townships for improvements such as those in respect to which the bonds here in question were issued, viz., water and sewers, if it sees fit to do so. Neither does it claim that the Legislature lacked such power at the time the legislation under attack on this appeal was enacted. Having such power, the Legislature could subsequently render such obligations general obligations without running afoul of the 14th Amendment.

*Charlotte Harbor Ry.* v. *Welles*, 260 U.S. 8, 11.
See also *Seattle* v. *Kelleher*, 195 U.S. 351, 359.

Respectfully submitted,

LEE E. JOSLYN, JR.,
*1710 Buhl Building,*
*Detroit 26, Michigan.*
SELDEN S. DICKINSON,
*800 National Bank Building,*
*Detroit 26, Michigan.*
*Attorneys for Appellees, Edgar B. Whitcomb, Anna S. Whitcomb and City of Highland Park.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

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# No. 424

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CITY OF FERNDALE, A MICHIGAN MUNICIPAL CORPORATION,

*Appellant,*

*v.*

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, JOHN G. CAMPBELL, TOWNSHIP OF ROYAL OAK, EDGAR B. WHITCOMB, ANNA S. WHITCOMB, CITY OF HIGHLAND PARK, VILLAGE OF OAK PARK, CITY OF PLEASANT RIDGE, CITY OF HUNTINGTON WOODS, CITY OF ROYAL OAK, CITY OF CLAWSON, CITY OF BERKLEY AND CITY OF HAZEL PARK,

*Appellees.*

## MOTION TO DISMISS OR AFFIRM

Now come Edgar B. Whitcomb, Anna S. Whitcomb and City of Highland Park, appellees, by Lee E. Joslyn, Jr., and Selden S. Dickinson, their attorneys, and move this Honorable Court:

1. To dismiss the writ of error heretofore issued in the above entitled cause, and all proceedings thereunder for the reason that no Federal question is presented by the record.

2. To dismiss the writ of error heretofore issued in the above entitled cause and all proceedings thereunder for the

reason that no substantial Federal question is presented by the record.

3. In case the foregoing motion is denied, to affirm the decree of the Supreme Court of Michigan for the reason that it is final as to appellant, and the questions involved are so frivolous as to need no further argument.

This motion is based on the records and files in said cause and the statement and authorities heretofore filed in this cause by appellees showing lack of jurisdiction of this Court of said appeal.

Dated at Detroit, Michigan, this 9th day of October, 1947.

LEE E. JOSLYN, JR.,
*1710 Buhl Building,*
*Detroit 26, Michigan.*
SELDEN S. DICKINSON,
*800 National Bank Building,*
*Detroit 26, Michigan.*
*Attorneys for Appellees, Edgar B. Whitcomb, Anna S. Whitcomb and City of Highland Park.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

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No. 424

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CITY OF FERNDALE,
a Michigan Municipal Corporation,
Appellant,

vs.

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, et al.,
Appellees

---

Appeal from the Supreme Court of the State of Michigan

---

## BRIEF FOR APPELLEE, TOWNSHIP OF ROYAL OAK, ON MOTION TO DISMISS OF AFFIRM

---

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Attorneys for Appellees.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit 26, Mich.

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IN THE

# Supreme Court of the United States

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CITY OF FERNDALE,
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Appellees

---

Appeal from the Supreme Court of the State of Michigan

---

## BRIEF FOR APPELLEE, TOWNSHIP OF ROYAL OAK, ON MOTION TO DISMISS OF AFFIRM

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(As the record has not as yet been printed in this court, the references herein, unless otherwise indicated, are to the record in the state supreme court, a certified copy of which is on file in this court.)

### STATEMENT OF CASE

We accept the statement of facts in appellant's brief for the purpose of disposing of our motion to dismiss or affirm.

## QUESTIONS INVOLVED

We also accept the statement of the questions involved.

## ARGUMENT AS TO LAW

**1. Appellant, City of Ferndale, cannot invoke the protection of the 14th Amendment, as against act of State of Michigan.**

In our statement opposing the jurisdiction of this court on the ground that no Federal question was involved, we pointed out that under well settled rules of law, the power of a state over its political subdivisions, is not limited by the 14th Amendment to the Federal constitution, citing:

*Trenton v. New Jersey*, 262 U. S. 182, 67 L. Ed. 937, 43 SCR 534, 29 ALR 1471;
*Newark v. New Jersey*, 262 U. S. 192, 67 L. Ed. 943, 43 SCR 539; and
*Risty v. Chicago, R. I. & P. Ry.*, 270 U. S. 378, 70 L. Ed. 641, 46 SCR 236.

While it is true, as pointed out in appellant's brief, none of the cases with the exception of the Risty case, involved an assessment by a state against one of its political subdivisions, the rule was clearly established that the provisions of the 14th Amendment to the Federal constitution do not apply to state action affecting one of its own municipal units. To the cases cited the following authorities in which this rule was recognized may also be added:

*Soliah v. Heskin*, 222 U. S. 522, 56 L. Ed. 294, 32 SCR 103;
*Joslin Mfg. Co. v. City of Providence*, 262 U. S. 668, 67 L. Ed. 1167, 43 SCR 684; and

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*City of Tulsa v. Oklahoma Natural Gas Co.*, 4 F. 2d 399, appeal dismissed, 269 U. S. 527, 70 L. Ed. 395, 46 SCR 17;

together with many others from courts of last resort of the several states collected in the volumes of the American Digest System, under Constitutional Law, Sec. 254.

We take issue with the statement of counsel that the statute in question required the Township of Royal Oak to levy a tax for a private purpose. At the time Act 58 Public Acts of Michigan for 1927 was adopted, only seven of the special assessment districts in question had been created, but, many other districts were created thereafter. The act was undoubtedly passed for the purpose of maintaining the credit of special assessment districts, to avoid defaults in special assessment bond issues, to make special assessment bonds a more attractive investment, to assist taxpayers to secure necessary local improvements, and, to require the township to assume a limited responsibility, as a guarantor of the bonds, in return for the incidental benefits which accrued to the entire township territory through the addition of facilities for the furnishing of sewer and water in a portion of the township territory. Some of these considerations have already been pointed out by the supreme court of Michigan in sustaining similar statutes respecting the payment of drain orders, in which it was pointed out that no question of the auditing or allowance of a private claim was involved in the application of the statutes.

*Moore v. Harrison*, 224 Mich. 512, 517-521.
*Graves v. Bliss*, 235 Mich. 364, 367-368.
*University of Michigan v. Pray*, 264 Mich. 693, 698.
*Royal Oak Drain District v. Keefe*, 87 Fed. 2d 786.
*City of Highland Park v. Oakland Co. Drain Comm'r.*, 312 Mich. 407, 416, 422.

See also:

*Dearborn Township v. City of Dearborn*, 308 Mich. 284, 293.

Apparently realizing that under well settled rules appellant, city of Ferndale, cannot invoke the protection of the 14th Amendment to the Constitution of the United States as a bar against the action of the state in requiring appellee, Township of Royal Oak, to assume liability as a guarantor of the special assessment bonds, the city now urges for the first time that it has the right to claim the protection of the constitutional amendment in behalf of is taxpayers. We do not controvert the rule that a municipality may, in behalf of its citizens, bring a representative action in behalf of a certain class or even all of its inhabitants, but such was not the fact in the case at bar. While it is true, in its amended answer the city alleged that the statute "would deprive the general taxpayers of their property without due process of law" (Sup. Ct. Record pp. 124-125), the answer was filed by the city as a municipal corporation of the state of Michigan, and no claim was made in the answer or during the trial that the city was acting as the representative of any class of its citizens. No testimony was offered at the hearing by the city as to the rights of its taxpayers, and no taxpayer was sworn as a witness. We submit that it is now too late, for the city to abandon its contention that as a municipal unit of the state of Michigan it is entitled to the protection of the 14th Amendment as against action by the state, and, for the first time, to assert such defense in behalf of its taxpayers.

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**2. No Federal question is involved in this appeal.**

No Federal question is involved in this appeal, because, as we have heretofore pointed out, appellant as a municipal unit of the state of Michigan, cannot invoke the protection of the Federal constitution as a bar to the action of the state in requiring the political subdivision, of which it was formerly a part, to assume a contingent liability on special assessment bonds. A substantial question, however, is involved. The supreme court of Michigan in

*Whitman v. Township of Royal Oak*, 269 Mich. 146, and

*Township of Royal Oak v. City of Pleasant Ridge*, 295 Mich. 284,

more than thirteen years ago, decreed that the township of Royal Oak was liable for the payment of these special assessment bonds. At that time these same constitutional questions, which appellant now raises, were decided adversely against the township. In the present action the supreme court of Michigan merely held that appellant city, which acquired a portion of the township territory through annexation subsequent to the issuing of the special assessment bonds, must now pay its proportionate share of this township liability. In addition, under the decree of the supreme court, it will also be required to account to the township for its share of the payments made from time to time on the bonds by the township, since the first default by the assessment districts in 1933.

We respectfully submit that appellant has not shown a case within the jurisdiction of this court, and that the motion to dismiss should be granted.

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1101 Pontiac State Bank Bldg.,
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DECEMBER 8, 1947.

*Per Curiam Decisions.*

No. 413. HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION ET AL. *v.* TOWNSHIP OF ROYAL OAK ET AL.; and

No. 424. CITY OF FERNDALE *v.* HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION ET AL. Appeals from the Supreme Court of Michigan. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of a substantial federal question. *Stanton G. Dondero* for appellants in No. 413. *Orph C. Holmes* and *Claude H. Stevens* for appellant in No. 424. *Glenn C. Gillespie* and *William C. Hudson* for Royal Oak,

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appellee in Nos. 413 and 424. *Lee E. Joslyn, Jr.* and *Selden S. Dickinson* for Whitcomb et al., appellees in Nos. 413 and 424. Reported below: 317 Mich. 607, 27 N. W. 2d 249.